

[AustLII](#)**Supreme Court of Victoria - Court of Appeal****DPP v Leys & Leys [2012] VSCA 304 (12 December 2012)**

Last Updated: 19 December 2012

SUPREME COURT OF VICTORIACOURT OF APPEAL

S APCR 2012 0054

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

v

TYSON JAMES  **LEYS** 

Respondent

S APCR 2012 0055

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

v

DILLON THOMAS  **LEYS** 

Respondent

JUDGES

REDLICH and TATE JJA and T FORREST AJA

WHERE HELD

MELBOURNE

DATE OF HEARING

6 August 2012

DATE OF JUDGMENT

12 December 2012

MEDIUM NEUTRAL CITATION[\[2012\] VSCA 304](#)1st Revision – 19 December 2012JUDGMENT APPEALED FROM*DPP v*  **Leys**  *and*  **Leys**  (Unreported, County Court of Victoria, Judge Allen, 13 February 2012)

CRIMINAL LAW – Crown appeal against sentence – Whether combination of Community Correction Order and suspended sentence of imprisonment in excess of three months was unlawful – [Section 44](#) of the *Sentencing Act 1991* – *R v Young* (1995) *A Crim R* 70, considered – Crown appeals allowed – Whether sentences of immediate imprisonment should be imposed – Respondents at liberty – Process of rehabilitation – Discretionary considerations – *DPP v Karazisis* [2010] VSCA 350; (2010) 206 *A Crim R* 14, applied.

STATUTORY INTERPRETATION – Commencement of Community Correction Order regime – [Section 37](#) of the *Sentencing Act 1991* – Pre-requisites to making a Community Correction Order not applicable to a sentence until whole of *Sentencing Amendment (Community Correction Reform) Act 2011* in operation – Illogical, irrational and unintended consequences of a literal construction – Principles governing the ‘reading in’ of words into a statute – *Wentworth Securities Ltd v Jones* [1980] *AC* 74, *Kingston v Keprose Pty Ltd* (1987) 11 *NSWLR* 404, *Cooper Brookes (Wollongong) Pty v FCT* (1981) CLR 297, considered – Whether only ‘reading down’ permissible –

Concept that words ‘actually used’ in the statute must be ‘reasonably open to such a construction’ discussed – Aspects of *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681, *R v PLV* (2001) 51 NSWLR 736, disapproved.

CHARTER – Whether Charter required the Court to depart from literal interpretation – Compatibility with the right against arbitrary detention – Compatibility with the right against greater penalties being imposed than applied at time offence committed – *Charter of Human Rights and Responsibilities*, ss 21(2), 27(2), 32.

<u>Appearances:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the DPP	Mr J Champion SC with Mr C Carr	Mr C Hyland, Solicitor for Public Prosecutions
For Tyson  Leys 	Mr O P Holdenson QC	Littleton Hackford & D’Allesandro
For Dillon  Leys 	Mr D A Dann with Ms A Cannon	Littleton Hackford & D’Allesandro
For the Attorney-General	Mr S McLeish SC with Ms J Davidson	Victorian Government Solicitor
For the Victorian Equal Opportunity & Human Rights Commission	Dr S Donaghue SC	Victorian Equal Opportunity & Human Rights Commission

REDLICH JA

TATE JA

T FORREST AJA:

Introduction

1 The Director of Public Prosecutions has appealed against sentences of imprisonment imposed on the respondents in the County Court on 13 February 2012 which were wholly suspended and Community Correction Orders (‘CCOs’) made, each of which was to commence immediately. The Director has appealed on the ground that the sentences fixed in the case of each respondent were unlawful as s 44 of the *Sentencing Act 1991* (‘the Act’) did not permit the combination of sentences that were imposed and on the further ground that the sentences were manifestly inadequate.

2 At the outset of the hearing of the appeals^[1] it became necessary to deal with the question as to when s 37 and s 44 of the Act commenced to operate and whether these provisions, being part of the Community Correction Order regime (‘the CCO regime’), applied to the respondents’ offending conduct which occurred in February 2010.

3 Following the conclusion of oral argument on 6 August 2012 the Court made a declaration to the effect that from 16 January 2012, being the time of the commencement of the new CCO regime, the pre-requisites to the making of a CCO, set out in s 37, including the receipt of a pre-sentence report and the consent of the offender, applied to those orders. The declaration was that cl 5 of Schedule 3 to the Act should be construed as if, after the words ‘after the commencement’, the words ‘of s 21’ appeared. The Court also indicated that it would in due course

allow the appeals and that, on re-exercising the sentencing discretion, neither respondent would be incarcerated. We now set out our reasons including those for making that declaration.

4 The respondents are brothers. On 13 February 2012 at the County Court in the Latrobe Valley, they pleaded guilty to various offences of violence and were sentenced as follows:

Tyson James ← Leys →				
Charge on Indictment	Offence	Maximum	Sentence	Cumulation
1	Recklessly Causing Serious Injury [Crimes Act 1958 (Vic) s 17]	15 years [Crimes Act 1958 (Vic) s 17]	18 months	Base
2	Intentionally Causing Injury [Crimes Act 1958 (Vic) s 18]	10 years [Crimes Act 1958 (Vic) s 18]	2 years (CCO)	N/A
3	Affray [Common Law]	5 years [Crimes Act 1958 (Vic) s 320]	12 months	6 months
Total Effective Sentence:		2 years' imprisonment wholly suspended for 2 years and a CCO with particular conditions for a period of 2 years.		
Non-Parole Period:		N/A		
Pre-sentence Detention Declared:		Nil		
6AAA Statement:		3 years' imprisonment		
Other orders: Forensic Sample Order				

Dillon Thomas  Leys 				
Charge on Indictment	Offence	Maximum	Sentence	Cumulation
1	Recklessly Causing Serious Injury [Crimes Act 1958 (Vic) s 17]	15 years [Crimes Act 1958 (Vic) s 17]	12 months	Base
2	Intentionally Causing Injury [Crimes Act 1958 (Vic) s 18]	10 years [Crimes Act 1958 (Vic) s 18]	2 years (CCO)	N/A
3	Affray [Common Law]	5 years	9 months	6 months

		[Crimes Act 1958 (Vic) s 320]		
Total Effective Sentence:		18 months' imprisonment wholly suspended for 2 years and a CCO with particular conditions for a period of 2 years.		
Non-Parole Period:		N/A		
Pre-sentence Detention Declared:		None		
6AAA Statement:		2 years 3 months' imprisonment		
Other orders:				
Forensic Sample Order				

Summary of the Offences

5 On 21 February 2010, both brothers consumed a large quantity of beer at McCartin's Hotel, Leongatha. The younger brother, Dillon  **Leys** , then aged 18, left the establishment and proceeded to engage in a punching and wrestling contest with another intoxicated patron, James O'Brien. Dillon  **Leys**  was restrained for a time but broke free and punched Mr O'Brien again. After a volley of punches Mr O'Brien fell to the ground. One Lee Franklin attempted to intervene but was held back as Dillon  **Leys**  continued to rain blows on Mr O'Brien. He was dragged off by Mr Franklin's wife.

6 Tyson  **Leys** , then aged 20, came upon the scene. Mr O'Brien was still on his hands and knees. Tyson Lees aimed what the learned sentencing judge described as an 'appalling football-style kick' at Mr O'Brien's head. Fortuitously it failed to connect. Mr O'Brien climbed to his feet and attempted to retreat. Tyson  **Leys**  pursued him and punched him to unconsciousness. Dillon  **Leys**  meanwhile set about Mr Franklin, punching him to the ground. Tyson  **Leys**  turned his attention to Mr Franklin and again attempted a football-style kick to the head – this kick also failed to connect. Tyson  **Leys**  delivered an uppercut to this semi-conscious man and the incident concluded.

7 Mr O'Brien suffered cuts, bruises, abrasions and a chipped lower front tooth. Mr Franklin suffered multiple fractures in the region of the left cheek bone and orbit and to his nose. He also suffered a detached retina that had to be reattached surgically. Numerous hotel patrons witnessed this gratuitously violent offending. Tyson Lees had been convicted of recklessly causing serious injury only eight months earlier.

8 The Director's first ground of appeal depends upon a construction of s 44 of the Act that does not permit the combination of sentences that were imposed, so that the sentences were unlawful.

44 Imprisonment and a community correction order

(1) Subject to subsection (2), a court may make a community correction order in respect of the offender in addition to sentencing the offender to a term of imprisonment of not more than 3 months, if the sentence of imprisonment is not suspended in whole or in part.

(2) If a court is sentencing an offender for two or more offences in the same proceeding to two or more sentences of imprisonment, the court may not make any community correction order in respect of the offender if the aggregate of those terms of imprisonment is more than 3 months, whether or not the terms of imprisonment are to be served (in whole or in part) concurrently or cumulatively.

(3) If a court makes a community correction order in respect of an offender in addition to a term of imprisonment, the community correction order commences on the release of the offender from imprisonment.

9 Section 37 sets out a number of pre-requisites to the making of a CCO under the Act:

37. Community Correction Order

A court may make a community correction order in respect of an offender if—

(a) the offender has been convicted or found guilty of an offence punishable by more than 5 penalty units; and

(b) the court has received a pre-sentence report (if required) and has had regard to any recommendations, information or matters identified in the report; and

(c) the offender consents to the order.

10 These and other sections forming part of the CCO regime under the Act were introduced by the Sentencing Amendment (Community Correction Reform) Act 2011 ('the Amending Act'[2]). Pursuant to s 2(3) of the Amending Act the CCO provisions were to come into operation on days to be proclaimed. 16 January 2012 was the day proclaimed as the day on which the sections that introduced the new CCO regime under the Act came into operation[3] being less than a month prior to the date on which the respondents were sentenced.

A. Preliminary issue – application of pre-requisites to CCOs

11 Before turning to the correct construction of s 44 it is necessary to deal with the question as to the date from which s 37 of the Act, being part of the CCO regime, applies to a sentence, in particular in respect of conduct that occurred in February 2010.

12 While a majority of the provisions in the Amending Act had already commenced by the time of sentencing, some provisions of the Amending Act remained and continue to remain inoperative. This accords with the phased commencement of parts of the Amending Act:

2. Commencement

(1) This Part, Part 4 and sections 3(13), 53 and 99 come into operation on the day after the day on which this Act receives the Royal Assent.

(2) Section 5(4) comes into operation on 1 January 2012.

(3) Subject to subsection (4), the remaining provisions of this Act come into operation on a day or days to be proclaimed.

(4) If a provision referred to in subsection (3) does not come into operation before 30 June 2013, it comes into operation on that day.

13 Under cl 5 of Schedule 3, being the 'Transitional Provisions' of the Act, s 37 is only taken to be effective on the commencement of the Amending Act:

5 Community correction orders

Section 37 as inserted by section 21 of the *Sentencing Amendment (Community Correction Reform) Act 2011* applies to a sentence imposed on or after the

commencement of that Act, irrespective of when the offence was committed or the finding of guilt was made.

14 Section 21 of the Amending Act, which inserted ss 37 and 44 into the Act, was proclaimed by the Governor in Council to commence on 16 January 2012, although a number of provisions in the Amending Act were expressly excluded from that commencement date. These excluded provisions, including ss 49, 98 and 101 to 106, along with all of Part 3, except s 68, had not commenced at the time the appeals were heard. Section 54 of the Amending Act, which inserted Schedule 3 into the Act, was also proclaimed to commence on 16 January 2012. If there was no mechanism regulating the commencement process of all the provisions in the Amending Act, [s 10A of the Interpretation of Legislation Act 1984](#) may have permitted a reading of the legislation that brought about its commencement as a whole.^[4] However it can be seen from the tiered commencement set out in s 2 of the Amending Act and the Parliamentary debates^[5] that it was intended that different parts of the Amending Act should commence at different times and that certain provisions of the Amending Act should remain inoperative until proclaimed by the Governor in Council, or 30 June 2013 at the latest. It therefore appeared to the Court that on their face s 2(3) of the Amending Act and cl 5 of Schedule 3 to the Act were in conflict, because although s 37 came into force as at 16 January 2012, it appeared to have no effect in its application to a sentence until the whole of the Amending Act came into operation. Given that the pre-requisites to the making of a CCO imposed by s 37 appear to limit significantly the circumstances in which a CCO may be made, any delay in its application had significant implications for the efficacy of the CCO regime.

15 The issue of the date on which s 37 applies to a sentence and the possible relevance of s 27(2)^[6] of the Charter of Human Rights and Responsibilities^[7] ('the Charter') having been raised with the parties, the Director informed the Attorney-General for the State of Victoria and the Victorian Equal Opportunity and Human Rights Commission ('the Commission') of these proceedings pursuant to s 35 of the Charter. On the hearing of the Director's appeals the Court adjourned the hearing of the issues concerning the application of s 37 to the CCO regime including any reliance on the Charter with respect to those issues. Each party, the Attorney-General^[8] and the Commission^[9], were given leave to file written submissions before the further hearing. In order to expedite the determination of the correct construction of s 44 of the Act, the Court completed the hearing of the Director's appeals on that question and on the question of whether the sentences were manifestly inadequate, before adjourning the hearing of the issues concerning the date on which s 37 commenced and the related Charter issue.

Construction of cl 5 Schedule 3

16 At the resumed hearing, all parties to the appeals submitted that s 37 of the Act was intended to apply to sentences imposed on or after 16 January 2012 so that the CCO regime as a whole was operative by that date. The Director, the Attorney-General, the Commission, Tyson  **Leys**  and Dillon  **Leys**  all submitted that the words 'of s 21' or 'of that section' should be read into cl 5, so that the phrase 'commencement of that Act' in cl 5 should be construed as meaning 'commencement of s 21 of that Act'. Section 37 of the Act would then be taken to apply to sentences imposed on or after 16 January 2012.

17 The words of cl 5, its statutory purpose and the context in which it was drafted, evince two opposing constructions. Under the 'literal' construction of cl 5, s 37 of the Act applies to sentences for offences committed on or after the commencement of the whole Amending Act – a date no later than 30 June 2013. This was argued not to achieve the purpose at which cl 5 and s 37 were directed. Under the alternative construction advanced by the parties, s 37 of the Act applies to a sentence imposed on or after the commencement of s 21, 16 January 2012. A departure from the 'literal' construction was argued to be necessary to ensure that the provision gave

effect to the purpose at which it was directed; this 'purposive construction' was thus one which, in the circumstances of the case, required a departure from grammatical meaning.

18 It is necessary first to consider the source of the power to make a CCO. The Director submitted that s 7(1) of the Act empowers the court to make the sentencing orders set out in each of the subsections. The joint judgment of Crockett and Ashley JJ in *R v Young*^[10] considered that the words of s 7 bespeak a grant of power.^[11] Section 5(3) of the Amending Act modified s 7(1)(e) of the Act so that the order made under it was to be referred to as a 'community correction' order and not a 'community-based' order, the effect of which is that if a court finds a person guilty of an offence, it may sentence that offender to a CCO. While a 'sentence' is not specifically defined in the Act, there is no doubt that a CCO constitutes a sentence for the purposes of the Act. In echoing the Parliamentary debates mentioned hereafter,^[12] s 36 of the Act states that the 'purpose of a community correction order is to provide a community based sentence that may be used for a wide range of offending behaviours'. A CCO is therefore identified under s 7(1) as one of the types of order a court may make, other options including a term of imprisonment, a suspended sentence and a fine.

19 Hence, the Director submitted that the power to impose a CCO arises from s 7(1)(e) and cl 5 only affects the date from which the pre-requisites under s 37 need to be met. The Solicitor-General, however, submitted that s 37 is the source of the power to impose a CCO. It was his contention that, irrespective of cl 5, the effect of the Amending Act was to enable a CCO to be imposed for conduct which occurred after 16 January 2012 and that cl 5, a transitional provision, should be construed so that from the commencement of s 21, s 37 applied to conduct before 16 January 2012. Thus, the Director and the Solicitor-General differed as to the consequence of a literal reading of cl 5. On this question, the submissions of the Commission and those of Dillon  **Leys**  are to the same effect as those of the Director while Tyson  **Leys**  adopted the submissions of the Attorney-General and alternatively those of the Commission.

20 Section 117(1) of the Act provides:

117. Transitional provisions

(1) This Act applies to any sentence imposed after the commencement of this section, irrespective of when the offence was committed.

21 The provision was introduced into the Act in 1997. In *Ocean Road Motel Pty Ltd v Pacific Acceptance Corp Ltd*, Taylor J, with Dixon CJ, McTiernan, Menzies and Owen JJ agreeing, said:^[13]

where by amendment a new provision is inserted into a principal Act and that provision speaks of 'this Act' it speaks of the whole Act of which from the time of amendment it forms part and, of course, of the Act in the form which it may from time to time thereafter assume.

22 It might be thought that the sentencing judge was entitled to impose a CCO on each of the respondents because the CCO regime, including s 7(1)(e), s 37 and s 44, had commenced after the commencement of s 117(1) and applied to the offending conduct – 'irrespective of' the fact that the offences were committed before the introduction of the CCO regime. However, s 117(1) does not address the circumstances where the Act is itself amended, the amendments including specific provisions that expressly regulate the application of the pre-requisites to a CCO. Nor is s 114 of the Act relevant as the amendments to the Act alter the range of sentencing options available but do not increase or reduce any existing penalties.^[14]

23 Clause 5 of Schedule 3 provides that s 37 of the Act as inserted by s 21 of the Amending Act 'applies to a sentence imposed on or after the commencement of that Act, irrespective of when the offence was committed'. The words 'that Act' refer to the Amending Act, which is the only Act referred to in that clause. A literal interpretation would construe the words 'that Act' as being a reference to the commencement of the entire Amending Act, rather than merely a particular provision or Part. That construction is also broadly consistent with s 11(4) of the [Interpretation of Legislation Act](#):

(4) A reference in an Act to the date of commencement of that Act or another Act or a portion containing 2 or more provisions of that Act or another Act is, if the whole of the Act or portion referred to did not come, or is not to come, into operation on the one day, a reference to the first day on or before which *all the provisions of the Act or* portion referred to have come, or will have come, into operation.^[15]

24 'All the provisions of the' Amending Act have not come, and unless proclaimed otherwise will not come, into operation until 30 June 2013. Reading cl 5 literally, if s 37 of the Act depends on the commencement of the Amending Act as a whole, then s 37 would not now be operative under the terms of that transitional provision and may not be operative until 30 June 2013.

25 The Solicitor-General submitted that the transitional provisions of Schedule 3 relate to conduct prior to the operating date but do not affect the making of a CCO, or the pre-requisites that apply, in relation to conduct that occurs after 16 January

25 2012.^[16] He submitted that without cl 5, there would be no transitional provision addressing the imposition of sentences for conduct before 16 January 2012.^[17]

26 The literal construction of cl 5 sets it into conflict with the general transitional effect of s 117(1) of the Act.^[18] As a matter of statutory construction, the former provision must prevail to the extent of the inconsistency, because cl 5 of Schedule 3 not only more specifically governs the application of the pre-requisites to a CCO than does s 117(1), but was also enacted after s 117(1).^[19] The legislative intention that the Transitional Provisions in Schedule 3 take immediate effect is reinforced by s 116A, which was inserted by the Amending Act immediately to precede s 117, which states in unmistakable terms: 'Schedule 3 has effect'.

27 Section 7(1)(e), as modified, commenced to operate on 16 January 2012.^[20] However s 37 of the Act limits the circumstances under which a CCO can be imposed. As mentioned above, the operation of s 37, and consequently s 7(1)(e), is complicated by cl 5, which, if read literally, states that s 37 applies to sentences imposed after the commencement of the whole of the Amending Act. Applying that literal construction of cl 5, the Director contended that even though courts are able to impose CCOs pursuant to s 7(1)(e), the criteria and limitations for imposing a CCO would not apply until the commencement of the entire Act. The Director submitted that on a literal reading of cl 5, though the power to make a CCO is in force, the restrictions upon that power by virtue of s 37 do not apply to sentences imposed between 16 January 2012 and the date upon which all of the provisions of the amending Act have come into force. Accordingly, while the prerequisites set out in s 37 did not apply, a CCO could thus be made without consent, or for an offence that carries a fine of five or fewer penalty units, or without obtaining an assessment report. The Solicitor-General submitted that a literal reading of cl 5 precluded the making of any CCO in relation to conduct before 16 January 2012. If the power to make a CCO came from s 7, then presumably s 37 did not apply to such conduct.

28 Although it is unnecessary to resolve the question of whether s 7(1)(e) or s 37 is the source of the power to impose a CCO, we consider that the better view is that s 7(1)(e) is the source of the power. It is also unnecessary to resolve the question whether the literal reading of cl 5 means that until the commencement of the whole of the

Amending Act no CCO can be made for conduct before 16 January 2012, or whether such an order can be made but the pre-requisites set out in s 37 do not apply to them. Either outcome would produce illogical, irrational and unintended consequences. A literal construction of cl 5 would have profound and unfortunate implications for the making of CCOs and the operation of the CCO regime in Victoria.

29 By virtue of s 4(1)(a) of the [Interpretation of Legislation Act](#), s 11(4) is subject to any contrary intention. The Director submitted that a contrary intention can be discerned and that we should prefer a construction which accords with s 35(a) of the [Interpretation of Legislation Act](#) that would promote the purpose of the Amending Act.

30 An analysis of the Amending Act as a whole, including s 2(3) and the extrinsic materials relating to the Amending Act, reveals a clear legislative intent for CCOs to replace combined custody and treatment orders ('CCTOs'), intensive correction orders ('ICOs') and community-based orders ('CBOs').

31 Section 1 of the Amending Act provides:

The main purposes of this Act are –

1. to amend [the Act], to repeal provisions as to combined custody and treatment orders, intensive correction orders and community-based orders; and
 2. to amend [the Act] to provide for new community correction orders and to provide for other matters in that Act
- ...

32 The Amending Act gave effect to these purposes by repealing the provisions enabling the making of CCTOs, ICOs and CBOs, and repealing the provisions that more generally governed their operation.

33 Section 5(1) of the Amending Act repealed s 7(1)(a)(b) of the Act, which had provided for the making of a CCTO. Section 5(2) repealed s 7(1)(b) of the Act, which had provided for the making of an ICO. Section 5(3) substituted for 'community-based' in s 7(1)(e) of the Act the words 'community correction'. Section 5 commenced on 16 January 2012 by Proclamation made 21 December 2011.^[21]

34 Section 12 of the Amending Act repealed Subdivision (1B) of Division 2 of Part 3 of the Act, that is, ss 18Q-18W of the Act which had set out the regime governing CCTOs, including the pre-requisites to the making of an order, the core conditions and the like. Section 15 of the Amending Act repealed ss 19-26 of the Act which had set out the regime governing ICOs. Section 21 of the Amending Act substituted the new provisions ss 36–48Q for the former provisions ss 36–48 which governed CBOs. Section 21 thus effected a repeal of the regime governing CBOs and introduced the new regime for CCOs (to replace CCTOs, ICOs and CBOs) in a single legislative action. Sections 12, 15 and 21 also all commenced on 16 January 2012 by Proclamation made 21 December 2011.

35 Thus, the repeal of the enabling provisions for the making of CCTOs, ICOs and CBOs, and the regime governing those orders, took effect on 16 January 2012 and the new CCO regime commenced on 16 January 2012.

36 Schedule 3 of the Amending Act provides for the transition from the old regime to the new sentencing regime. Clauses 2–4 of Schedule 3 provide that in relation to offenders subject to ongoing CCTOs, ICOs, and CBOs, the Act continues as in force prior to the commencement of the Amending Act. Where an offender commits the offence of contravening such an order, and the offence occurs partly before the commencement of the Amending Act and partly after commencement, the breach is taken to have been committed before the commencement of the new regime.^[22] No lapse between the imposition of orders under the old regime and the commencement of the new regime was contemplated. Parliament intended courts to sentence offenders to a CCO, where appropriate, whenever the offence was committed and intended that courts dealing with breaches of CCTOs,

ICOs, and CBOs made before the commencement of the CCO regime do so as though they occurred before the commencement of the new regime.

37 In addition to the purpose provision in s 1 of the Amending Act, the extrinsic materials provide a clear indication of the legislative intent that s 37 of the Act is to form part of a suite of provisions enacted to effect the substitution of CCOs for CCTOs, ICOs and CBOs. In our view there is nothing in the extrinsic materials to suggest that Parliament intended to stagger the introduction of s 37, so that it did not apply until the commencement of the entire Amending Act, or to support a view that a CCO could be made without regard to the pre-requisites of s 37.

38 The Explanatory Memorandum to the Bill of the Amending Act relevantly states:[23]

Clause 21:

substitutes the provisions relating to the community-based order with a New Part 3A of [the Act].

New Part 3A establishes a new sentencing option for courts called a community correction order (CCO).

The CCO is a new sentence for the range of offenders who previously would have received a community-based-order (CBO), intensive correction order (ICO) or combined custody and treatment order (CCTO). The CCO is also intended as an alternative sentencing option for offenders who are at risk of being sent to jail. The broad range of conditions that may be attached to a CCO will give courts flexibility to graduate their response to address the needs of offenders and set appropriate punishments.

...

New Section 37 sets out the pre-requisites before a Court can make a CCO.

39 In the Second Reading Speech, the Attorney-General stated:[24]

The current range of community-based sentences will be replaced with a single, flexible community correction order (CCO) that will strengthen community sentencing.

...

Specifically, the CCO will replace the combined custody treatment order (CCTO), intensive correction order (ICO), the intensive correction management order (which has not come into effect) and the community-based order (CBO). From the commencement of this bill, these orders will no longer be available to courts in sentencing offenders. Existing orders will continue until their end date.

...

The principal reforms are intended to commence early next year, with the CCO bond condition, driving restrictions and new powers for Corrections Victoria to commence mid-2012.

40 The express purpose of introducing the CCO regime was to replace the old regime of CCTOs, ICOs, and CBOs, for the purpose of providing sentencing judges with a more flexible approach to community sentencing.

There is no ascertainable reason why Parliament would not have wanted s 37 to apply to any CCO imposed on or after 16 January 2012.

A purposive construction of cl 5

41 We turn to the question whether a construction can be given to cl 5 that ensures that its purpose is met.

42 Although the effect of an amendment to a statute is generally to be ascertained by construing the amended statute, the expression of the relevant parliamentary intention is here to be found in the Amending Act which contains the operative provisions and which alters the terms of the law.^[25]

43 All of the parties' submissions rested upon the proposition that a literal construction of cl 5 was inconsistent with the purpose and the overall statutory scheme of the Amending Act and the inconsistency was due to drafting inadvertence. They invoked the principle of statutory construction that unless the statutory language is intractable, an intention to produce an unjust or capricious result should not be attributed to the legislature.^[26] Parliament is taken to expect legislation to be applied with common sense.^[27] The ultimate question for decision was whether, by the application of a relevant principle of statutory construction, the legislative oversight could be judicially remedied by adding after the words 'after the commencement', the words 'of s 21', which would appear before the words 'of the Act'.

44 We begin by considering the general principles of statutory construction governing the 'reading down' or 'reading in' of words.

(i) The principles governing the 'reading down' or 'reading in' of words

45 Section 35(a) of the [Interpretation of Legislation Act](#) directs that in the interpretation of an Act a construction that would promote the purpose or object of the Act shall be preferred to a construction that would not promote that purpose or object. In ordinary circumstances, the literal interpretation of a statutory provision will give effect to its purpose.^[28] It is only where, as here, the literal interpretation fails to promote the purpose of a provision that it becomes necessary to determine whether an alternative construction, one that does achieve the purpose, ought to be adopted even if that construction requires departure from the literal meaning. As McHugh JA said in *Kingston v Keprose Pty Ltd*:^[29]

A purposive and not a literal approach is the method of statutory construction which now prevails ... In most cases the grammatical meaning of a provision will give effect to the purpose of the legislation. A search for the grammatical meaning still constitutes the starting point. But if the grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act.

46 The process of construction must always begin by examining the context of the provision with the object of adopting an interpretation that is consistent with the ordinary and natural meaning of the words derived from the context in which they appear and having regard to the legislative purpose of all the provisions of the statute.^[30] In *Project Blue Sky v ABA*^[31] McHugh, Gummow, Kirby and Hayne JJ stated:^[32]

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'.

47 In *Commissioner for Railways (NSW) v Agalianos*,^[33] Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'.^[34] In *CIC Insurance Ltd v Bankstown Football Club Ltd*,^[35] Brennan CJ, Dawson, Toohey and Gummow JJ described the proper approach to statutory construction at common law, apart from reliance upon the provisions of the *Acts Interpretation Act 1901* (Cth), in these terms:^[36]

Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd* ..., if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.

48 The common law has long sought to avoid interpreting legislation in a manner that leads to a result that is manifestly absurd, unreasonable, creates an anomaly or otherwise produces an irrational or illogical result.^[37] In certain circumstances, departure from the literal meaning is justified and 'the court is entitled to attribute to the provision the meaning which it was obviously intended to have'.^[38]

49 The question which arises here is whether judicial intervention could be justified to depart from the literal meaning of cl 5 by adding or implying additional words where the consideration of the legislative history of cl 5, its context and the clear intent of the Parliament leads to the conclusion that applying a literal meaning would stultify that intent?^[39] That a court may sometimes be justified in abandoning the literal meaning and adding or implying words to avoid an unintended result can no longer be doubted.^[40]

50 In *Cooper Brookes (Wollongong) Pty Ltd v FCT*,^[41] Gibbs CJ said that departure from the literal meaning may be justified where the result of giving words their ordinary meaning would be so 'irrational that the court is forced to the conclusion that the draftsman has made a mistake'.^[42] He made clear that departing from the literal meaning may sometimes also be justified in cases falling short of manifest irrationality especially where, 'on a full view of the Act, considering its scheme and its machinery and the manifest purpose of it'^[43] the legislative history 'explains how the mistake occurred'.^[44] The statutory context concerned whether the words 'the company' in s 80B(5)(c) of the *Income Tax Assessment Act 1936* (Cth) referred to the holding company (as the definition under s 80C(3) suggested) or whether in its application to s 80B(5)(c), s 80C(3) should be read as capable of referring to a subsidiary company. Mason and Wilson JJ posed the question thus:^[45]

[U]nless s 80B(5) had an extended application, by virtue of s 80C(3), to a taxpayer which is the subsidiary of some other company, then the appellant was entitled to the deduction which it claimed.

51 They found that s 80C(3) could be construed to ensure s 80B(5)(c) had the extended application intended. They concluded that, in the circumstances of the case, a construction that departed from the literal meaning and met the purpose of the Act was reasonably open and preferable to a literal interpretation of the words, having

regard to the legislative scheme viewed as a whole.^[46] They considered that reading words into the section so as to make it comply with the clear statutory intent was a matter of necessary implication to be deduced from the legislative scheme as a whole. As they said:^[47]

Generally speaking, mere inconvenience of result in itself is not a ground for departing from the natural and ordinary sense of the language read in its context. But there are cases in which inconvenience of result or improbability of result assists the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute.

52 While labels such as ‘absurd’, ‘extraordinary’, ‘capricious’, ‘irrational’ or ‘obscure’, when applied to the literal interpretation of a statutory provision, may provide grounds for concluding that the legislature intended no such operation and that an alternative interpretation must be preferred, Mason and Wilson JJ, like Gibbs CJ, did not confine the propriety of departing from the literal interpretation to situations described by these labels. They considered that departing from the literal meaning of a statutory provision may be permissible where the literal reading does not conform to the legislative intent as ascertained from the provisions of the statute as a whole, including the policy which may be discerned from those provisions.^[48] Aickin J, in his dissenting judgment, also recognised that words can be read into a statute where the words actually used produce an absurd result, but he considered that the omission and how it should be remedied should be very clear.^[49]

53 In *Director of Public Prosecutions (Nauru) v Fowler*^[50] the relevant provision was to be construed as though a word was moved from its original place in the provision to a later place so that its modified literal meaning conformed with its intended purpose. Gibbs CJ, Murphy, Wilson Deane and Dawson JJ said:^[51]

By s 14(3) of the Appeals Act it is provided as follows:

"Subject to the special provisions of this Act, the Supreme Court shall, if it allows an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered or, if the interests of justice so require, order a new trial."

... if s 14(3) is construed in its strict grammatical sense, it creates a difficulty, for it appears to suggest that the alternatives open to the Supreme Court when it allows an appeal are (1) to quash the conviction and direct a judgment and verdict of acquittal to be entered, and (2) if the interests of justice so require, to order a new trial; or in other words that a new trial cannot be ordered if a conviction is quashed. It is however apparent that a simple grammatical mistake was made in the drafting of the sub-section, and that if the strict grammatical sense of the words is adhered to it would lead to an absurdity. In these circumstances the Court is entitled to attribute to the provision the meaning which it was obviously intended to have. Section 14(3) must therefore be read as though the word ‘either’ appeared not before the words ‘quash the conviction’ but before the words ‘direct a judgment’.

54 In *Kingston v Keprose Pty Ltd*,^[52] McHugh JA dealt at length with the principles applicable to reading words into legislation.^[53] His Honour spoke of a need for the court clearly to identify the mischief or purpose at which the provision is aimed. If purpose or context show that Parliament did not intend the grammatical meaning of the words to apply, a court may be entitled to depart from that meaning. He observed that a court may read words into a legislative provision if by inadvertence Parliament has failed to deal with an eventuality required to be dealt

with if the purpose of the Act is to be achieved. His Honour adopted the principles formulated by Lord Diplock in *Wentworth Securities Ltd v Jones*^[54] concerning the three conditions which must be satisfied before a court may read words into a legislative provision to give effect to its purpose. Lord Diplock said:^[55]

My Lords, I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it. *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed. Such an attempt crosses the boundary between construction and legislation. It becomes a usurpation of a function which under the constitution of this country is vested in the legislature to the exclusion of the courts.

55 McHugh JA accepted that there may be occasions where it will be necessary to give a meaning to certain words in a statutory provision which, standing alone, those words could not bear:^[56]

[I]t is not only when words have been inadvertently used that a court is empowered to give a legislative provision a strained construction. A strained construction may be justified because words have been omitted: *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*; or because by inadvertence Parliament has failed to deal with an eventuality required to be dealt with if the purpose of the Act is to be achieved: *Jones v Wrotham Park Settled Estates*; or because the statute proceeds on a mistaken assumption: *R v Draper*; or because the purpose of the provision indicates that Parliament did not intend the grammatical meaning to apply: *Adler v George*; *Wiltshire v Barrett*; *R v Oakes*; or because words must be omitted to avoid absurdity: *Re Lockwood*. As many of the cases show, the purpose of the legislation may require a meaning to be placed on the words of a particular provision which, standing alone, they cannot reasonably bear.

56 He gave a number of examples where the construction adopted went beyond the literal meaning of the words used:^[57]

In *Adler v George*, the Divisional Court held that the words 'in the vicinity of any prohibited place' meant 'in or in the vicinity of any prohibited place'. In *Wiltshire v Barrett* the Court of Appeal [of England and Wales] held that the words 'may arrest ... a person committing an offence' meant 'may arrest ... a person committing or

apparently committing an offence'. In *Kammins* the House of Lords held that the words, 'No application ... shall be entertained unless ...' meant that some applications could be entertained although the unless clause was not satisfied.

57 He reaffirmed the three conditions that must be satisfied for words to be 'read into' a statute as identified by Lord Diplock:[58]

First, the court must know the mischief with which the Act was dealing. Secondly, the court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.

58 Consistently with his earlier observations, McHugh JA must be taken to have intended that the second condition extend to those circumstances where words have been inadvertently used or omitted, where the statute proceeds on a mistaken assumption, where the purpose of a provision indicates that Parliament did not intend the grammatical meaning to apply, or where words must be omitted to avoid absurdity.

59 McHugh JA re-iterated the three conditions which permit words to be read into legislation in *Birmingham v Corrective Services Commission of New South Wales*[59] and held that, as the Parliament had omitted to use the words 'minimum term' in describing the advantages a transferred prisoner might retain under the law of the transferring State when it had clearly intended that the advantages or rights of a transferring prisoner extend that far, the words 'sentence of imprisonment' should be construed as including 'minimum term' and not as referring to the head sentence alone.[60]

60 McHugh J endorsed the same approach in the High Court in *Newcastle City Council v GIO General Ltd*[61] in construing the [Insurance Contracts Act 1984](#) (Cth). The principal issue was whether an insurance policy entered into by Newcastle City Council with GIO General covered claims that were made against the Council by reason of the Newcastle earthquake in 1989 after the expiration of the policy period. The policy provided indemnity in respect of 'claims made' during the period of insurance but did not include an extension of cover to claims which were made against the insured after the period of insurance but which arose out of circumstances which were notified to the insurer within the period of cover. On its face, the policy did not oblige GIO to indemnify the Council in respect of those claims. The Council sought to rely on [s 40\(3\)](#) of the [Insurance Contracts Act](#) to achieve the type of protection it would have obtained had the policy included this extended cover.

61 [Section 40\(3\)](#) of the [Insurance Contracts Act](#) provided that:

Where the insured gave notice in writing to the insurer of facts that might give rise to a claim against the insured as soon as was reasonably practicable after the insured became aware of those facts but before the insurance cover provided by the contract expired, the insurer is not relieved of liability under the contract in respect of the claim, when made, by reason only that it was made after the expiration of the period of the insurance cover provided by the contract.

62 The Council relied on [s 40\(3\)](#) because it had notified GIO of the facts that might give rise to a claim within the policy period although the claims that were the subject of the proceedings were made against it after the last extension of the policy had expired. The New South Wales Court of Appeal had held that [s 40\(3\)](#) did not apply to the policy because the requirements of [s 40\(1\)](#) were not met. [Section 40\(1\)](#) provided:

This section applies in relation to a contract of liability insurance the effect of which is that the insurer's liability is excluded or limited by reason that notice of a claim against the insured in respect of a loss suffered by some other person is not given to the insurer before the expiration of the period of the insurance cover provided by the contract.

63 Kirby P, in the New South Wales Court of Appeal, had held that for s 40(1) to be satisfied the policy had to contain at least a provision requiring notification of claims as a condition precedent to the insurer's liability to indemnify. The GIO policy contained no such condition precedent. In rejecting the need for such a condition precedent, McHugh J acknowledged that on its face s 40(1) 'appears to be dealing with contracts of liability insurance that exclude or reduce liability for the sole reason that the insured has not given notice to the insurer of an existing claim before the period of insurance has come to an end'.^[62] However, he considered that such a construction was difficult to reconcile with the words of s 40(3) and the mischief it was designed to overcome, namely, to reduce the occasions when an insured will lose its indemnity by reason of a claim being made against it after the period of insurance has expired. A literal interpretation of s 40(1) would have the effect that 'a claims made policy would never come within s 40 even though it is the paradigm example of a policy that s 40(3) was intended to protect'.^[63] He concluded:^[64]

In my opinion, each of the three conditions to which Lord Diplock referred in *Jones* is satisfied in this case. First, s 40(3) and the extrinsic material show that the mischief with which the section is dealing is the inapplicability of an indemnity provision by reason only of a claim being made after the period of cover has expired. Second, both s 40(3) and the extrinsic material show that by inadvertence Parliament has used language in enacting s 40(1) which read literally does not apply to some policies concerned with claims made outside the period of cover but which must have been intended to apply to them if the purpose of the Act is to be achieved. Third, if Parliament had had this defect drawn to its attention, it would have overcome it by adding at the end of s 40(1) the words '*because no claim was made against the insured before that period expired*'.^[65]

64 McHugh J further stated that if the target of a legislative provision is clear, the court's duty is to ensure that the target is 'hit'^[66] rather than to report that it has been missed. As a result, on rare occasions a court may be justified in treating a provision as containing additional words if those additional words will give effect to the legislative purpose and the three conditions identified by Lord Diplock in *Wentworth Securities v Jones* are satisfied. But McHugh J referred to the rider in the observations of Brennan CJ in *IW v City of Perth*,^[67] that even when a court adopts a purposive construction to remedial legislation it 'is not at liberty to give it a construction that is unreasonable or unnatural'.^[68]

65 In *MacAlister v The Queen*^[69] the High Court substituted the words 'his or her offence' for the words 'an offence' in s 77 of the *Penalties and Sentences Act 1985* to enable an appeal to the Full Court from a sentence of imprisonment:^[70]

To give the words 'an offence' in s 77 their literal meaning would defeat the purpose of the legislation and produce the unreasonable result that there was no right of appeal from the County Court against a s 70(b) order. Such a result was certainly not intended. On the other hand, if the words 'an offence' are read as 'his or her offence', as we think their context and the apparent intention of the section suggest they should be read, the provision has a sensible meaning which gives effect to its evident

purpose. In *Luke v Inland Revenue Commissioners* (1963) AC 557, Lord Reid, when confronted with a similar problem, said [at p 577]:

"The general principle is well settled. It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail."

In their context, the words 'an offence' are not 'absolutely incapable of' meaning 'his or her offence', and they should be so read.

66 In *Mills v Meeking*[71] the High Court had to determine whether the offence of furnishing a sample of breath for analysis, within three hours after driving or being in charge of a motor vehicle, where the analysis revealed that more than the prescribed concentration of alcohol was present, applied only to circumstances where the motor vehicle had been involved in an accident. The relevant statutory provision, s 49(1)(f) of the *Road Safety Act 1986*, made no reference to an accident but some of the surrounding provisions did. To construe s 49(1)(f) as being so restricted required that words be read into the section.

67 Dawson J, in dissent, was prepared to read the necessary words of limitation into s 49(1)(f).[72] In doing so, he made it clear that the reference to the purpose of an Act may assist not only in choosing between two alternative constructions, where the words used were ambiguous and the provision offered more than one construction on its face, but also in generating whether there were two alternative meanings available in the first place. He said:[73]

Section 35 of the *Interpretation of Legislation Act* must, I think, mean that the purposes stated in Pt 5 of the *Road Safety Act* are to be taken into account in construing the provisions of that Part, not only where those provisions on their face offer more than one construction, but also in determining whether more than one construction is open. The requirement that a court look to the purpose or object of the Act is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction. The mischief or purpose rule required an ambiguity or inconsistency before a court could have regard to purpose ... The approach required by s 35 needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction.

68 His Honour adopted an approach to the 'reading in' of words that reflected that expressed by Lord Diplock. Reference to the purpose of a provision, or the Act in which it appears, may reveal that there has been a drafting oversight which can be repaired so long as the modification is precisely identifiable as that which is necessary to effectuate that purpose and is consistent with the wording otherwise adopted by the drafter. The task of a court must remain one of construing legislation and not re-writing it. These observations are entirely compatible with the above formulation by McHugh J including the caution expressed by Brennan CJ in *IW v City of Perth*. [74]

69 In *Mills v Meeking* McHugh J, also in dissent, observed that 'once it is apparent that the literal or grammatical meaning of a provision does not conform to the legislative purpose as ascertained from the statute as a whole, the court is entitled to give effect to that purpose by addition to, omission from, or clarification of the particular provision'. [75]

70 In *Saraswati v The Queen*[76] McHugh J, with whose judgment Toohey J agreed, considered the need to give effect to the purpose and object underlying legislation and expressed the view that if the literal or grammatical meaning of a provision does not give effect to that purpose, that meaning cannot be regarded as the 'ordinary

meaning' and must give way to a meaning which will promote the underlying purpose or object. His Honour reiterated:[77]

Moreover, once a court concludes that the literal or grammatical meaning of a provision does not conform to the legislative purpose as ascertained from the statute as a whole including the policy which may be discerned from its provisions, it is entitled to give effect to that purpose by addition to, omission from, or clarification of, the particular provision...

Immediately after the passage cited, however, his Honour warned that in a case where the text is grammatically capable of only one meaning and neither the context nor any purpose of the Act throws any real doubt on that meaning, the grammatical meaning is to be adopted as the 'ordinary meaning'. His Honour continued:[78]

A court cannot depart from 'the ordinary meaning' of a legislative provision simply because that meaning produces anomalies... But ... the [Interpretation Act](#) assumes that it may do so if the ordinary meaning conveyed by the text of the provision 'taking into account its context in the Act ... and the purpose or object underlying the Act' leads to a result that is 'manifestly absurd' or 'unreasonable'.

71 In Bension on Statutory Interpretation,[79] it is stated that there is a presumption that the legislature intends the court to apply a construction rectifying any error in the drafting of an enactment where it is required in order to give effect to the legislature's intention. The author cites the decision of *Inco Europe Ltd v First Choice Distribution (A Firm)*. [80] Lord Nicholls of Birkenhead, in delivering the judgment of the House of Lords, applied the three conditions as set out by Lord Diplock but said the 'power is confined to plain cases of drafting mistakes'. [81] He 'freely acknowledge[d]' [82] that the interpretation he adopted, of reading s 18(1)(g) of the Supreme Court Act 1981 (UK) which provided that, 'No appeal shall lie to the Court of Appeal ... except as provided by Part 1 of the Arbitration Act 1996, from any decision of the High Court under that Part', as though the words 'under that Part' were replaced by the words 'under a section in that Part which provides for an appeal from such decision', involved 'reading words into the paragraph'. [83] The literal reading of s 18(1)(g) made a major and unintended legislative change. He said:[84]

By including within its scope every court decision under Part 1, the new paragraph abolished an appeal to the Court of Appeal from all court decisions made under Part 1 of the Act save for decisions made under sections containing restrictions on such an appeal.

72 He concluded that s 18(1)(g) was not intended to preclude parties appealing from court decisions under various sections of Part 1, where the right to appeal came from sources outside the Act itself, including, relevantly, a decision of the High Court to stay legal proceedings [85] brought by a party to an arbitration agreement in respect of a matter which under the agreement was to be referred to arbitration. He said:[86]

I am left in no doubt that, for once, the draftsman slipped up. ...

It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words.

73 In holding that all three conditions were satisfied, he re-stated the third of the conditions to the effect that the court must be sure of 'the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed'.^[87] Although Lord Nicholls based his proposition upon Lord Diplock's statement, Lord Nicholls' formulation may permit a greater degree of flexibility than the test as stated by Lord Diplock. However the test is formulated, there must be a high degree of exactitude in the words the court determines were omitted by Parliament.^[88]

74 Lord Nicholls also indicated that the satisfaction of the three conditions may not be sufficient before interpreting a statute in this way:^[89]

Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd v Schindler* Scarman LJ observed that *the insertion must not be too big, or too much at variance with the language used by the legislature*. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation.

75 In *Victorian WorkCover Authority v Wilson*,^[90] Callaway JA (with whom Winneke P agreed^[91]) read in the words 'or the entitlement to compensation' after 'either of the assessments' in s 104B(9) of the *Accident Compensation Act 1985*^[92] which provided:

The Authority ... must within 14 days of being advised by the worker that the worker disputes either of the assessments refer the medical questions as to the degree of permanent impairment resulting from the injury to the worker for both the purposes specified in sub-section (5)(a) [relating to the degree of permanent impairment] and whether the worker has an injury which is a total loss mentioned in the Table to section 98E(1) to a Medical Panel for its opinion under section 67.

76 He considered that reading in the relevant words was necessary because 'the question whether a worker has an injury which is a total loss ... is independent of an assessment as to his or her degree of impairment resulting from the injury'^[93] and the statutory scheme revealed that Parliament must have intended that a worker who accepted the assessments would still have recourse to a medical panel on the question of whether he or she had an injury which was a total loss. Referring to the three conditions specified by Lord Diplock in *Wentworth Securities v Jones* Callaway JA observed that those conditions were satisfied but that it was 'unnecessary to decide whether they are necessary or necessary and sufficient or usually necessary and sufficient'.^[94]

77 In *Victorian Workcover Authority v Vitoratos*^[95] this Court considered those provisions of the *Accident Compensation Act 1985* concerned with the interest to be paid in respect of outstanding weekly compensation payments. An amendment to the *Accident Compensation Act*, read literally, meant that an incapacitated worker was to be paid interest as if all future weekly payments fell due on the date the incapacity commenced rather than being limited to the period during which a particular weekly payment was due but unpaid. This was a dramatic change in the method of calculating interest which was not remarked upon in the Parliamentary debates. The Court rejected the appellant's submission that words ought be read into the relevant section on the grounds that the three conditions set out by Lord Diplock were not satisfied;^[96] there was an intelligible policy basis for the section read literally;^[97] the

additional words required were too extensive;^[98] they would have in effect resurrected the previous repealed provision; and they did not 'give effect to the meaning derived from the Act itself'.^[99] Buchanan JA said:^[100]

The literal meaning of the words in the section is clear. The appellant's position can only be reached by a redrafting of the section. Certain techniques of construction, such as reading down general words and giving words an ambulatory construction may appear to read words into statutes, but *they are based upon the text of the statutes*.

78 Callaway JA again left open the question whether Lord Diplock's three conditions are necessary or sufficient conditions to exercise the power to read in words into a statute. He considered that^[101]

the result of the language adopted ... is unlikely to be what Parliament intended, but, in my opinion, the repair work required would violate the separation of powers.

79 Nettle JA, in dissent, took the view that it was inherently unlikely that the Parliament intended to achieve the result which a literal reading would effect, there being nothing in the Act or the extrinsic materials to suggest that Parliament intended to change the basis on which interest on outstanding weekly payments was to be calculated. He considered that there had been a drafting mistake in failing to carry over a previous definition or in assuming that the relevant words would continue to be interpreted in the manner in which they had been defined in the past. He concluded, on the basis of the history of the legislation, what he considered to be the irrational consequences of a literal construction, the implications of the relevant section, and the scheme and machinery of the Act as a whole, that an interpretation of the section should be adopted that departed from its literal meaning in order to give effect to the purpose of the Act.^[102]

80 There are two further relatively recent decisions in which this Court has been prepared to read words into a statute to give effect to the purpose of the Act. In *Byrne v Marles*^[103] Nettle JA,^[104] whilst recognising that it is a strong thing to 'read into an Act of Parliament words which are not there'^[105] was prepared to depart from the literal meaning of s 4.4.7 and s 4.4.9 of the [Legal Profession Act 2004](#) to ensure that the legislation did not 'miss ... the target at which it is aimed'.^[106] He found that the words of the sections were reasonably open to an alternative construction that would carry Parliament's intention into effect. This involved construing a provision which, read literally, meant that the Legal Services Commissioner did not have power to investigate a complaint unless it was about conduct which, if proved, would amount to unprofessional conduct or misconduct, as rather imposing a test which required that the Commissioner be reasonably satisfied that a complaint would amount to unprofessional conduct or misconduct.^[107]

81 In *DPP v Guariglia*^[108] each member of the Court^[109] departed from a literal reading of cl 9 of Schedule 4 of the Criminal Procedure Act to give effect to its purpose. The purpose of cl 9 of Schedule 4 was to ensure that where a new trial was held after the commencement date of the Criminal Procedure Act all of the procedural aspects of that Act were to apply to the new trial. However, the critical section, s 164, read literally, relevantly defined a 'fresh indictment' as an indictment which included a charge for the same offence as an offence charged in an 'indictment' previously filed in court. The Court held that the definition of 'fresh indictment' in s 164 should be read as extending to a charge for the same offence charged in a 'presentment' previously filed in court against the accused,^[110] the language of 'presentment' being that used in the context of the former regime under the [Crimes Act 1958](#). That construction, together with the adoption of a relevant similar construction to other related sections,^[111] had the effect that, where a new trial is ordered, a fresh indictment may be filed. Nettle JA said:^[112]

Admittedly ... it is a big thing to read into legislation words which are not there. This is a case, however, in which I consider that, because of the evident purpose of Clause 9 of Schedule 4, one can be satisfied that, in failing to refer in s 164 to a 'presentment previously filed' Parliament has simply overlooked an eventuality which must be dealt

with if the purpose of Clause 9 of Schedule 4 is to be achieved; and one can state with certainty the words Parliament would have used to overcome the omission if its attention had been drawn to the defect.

82 In the very recent case of *WBM v Chief Commissioner for Police*^[113] Warren CJ applied these general principles, stating:^[114]

Consistently with the common law, one must take the purpose and objects of Victorian legislation into account even when this would result in an interpretation that differs from a provision's literal meaning. One may avoid the literal meaning of an Act if the result would have been incongruous, contrary to objects of the Act, capricious and irrational. However, 'the modification must be precisely identifiable as that which is necessary to effectuate those purposes and it must be consistent with the wording otherwise adopted by the draftsman'. The limitation is that a court may give a 'strained' construction to the language used to achieve a clear legislative purpose so long as the construction is neither unreasonable nor unnatural.

83 A significant case in this area is that of *R v Young*^[115] where Spigelman CJ referred to Lord Diplock's statement of principle as 'the contemporary approach'.^[116] As is apparent from our analysis of the authorities above, this approach is one that has now been widely applied in Australia.^[117] In *Young* the New South Wales Court of Appeal considered whether Parliament had failed, by inadvertence, to deal with an eventuality which needed to be dealt with if the purpose of the *Evidence Act* was to be achieved; namely, the adverse effects of the revelation of protected confidences in an ancillary process as much as from use of the confidences in evidence in court. The Court held that the 'words of the statute cannot ... be strained to remedy the alleged mistake by Parliament' and 'the words "adduced in evidence" cannot reasonably be extended to embrace production pursuant to a subpoena'.^[118] Spigelman CJ cautioned against any misunderstanding of the passage from Lord Diplock in *Wentworth Securities Ltd v Jones*. With respect to the general principles to be applied, Spigelman CJ said:^[119]

The proposition that a court can introduce words into an Act of Parliament offends a fundamental principle of our constitutional law. It is no part of the function of any judge to amend legislation. The task of the courts is to determine what Parliament meant by the words it used, not to determine what Parliament intended to say.

In order to construe the words actually used by Parliament, it is sometimes necessary to give them an effect as if they contained additional words. *This is not, however, to introduce words into the Act. This involves the construction of the words actually used.* Judicial statements which appear to have been prepared to countenance something more than this, should be so understood.

84 He observed that satisfaction of the three conditions set out by Lord Diplock did not entail that a court was entitled to insert words into a statute:^[120]

His Lordship did not say, nor do I take any of their Honours who have adopted the passage to suggest, that whenever the three conditions are satisfied, a court is at liberty to supply the omission of the legislature. Rather, his Lordship was saying that in the absence of any one of the three conditions, the court cannot construe a statute with the effect that certain words appear in the statute.

As I understand the recent cases, they are not authority for the proposition that a court is entitled, upon satisfaction of the three conditions postulated by Lord Diplock, to perfect the parliamentary intention by inserting words in a statute. The court may construe words in the statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate. However, *the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based.*

85 James J in his reasons in *Young* adopted a broader approach to the task of ‘adding to the language the legislature has chosen’.[121] So has the New Zealand Court of Appeal in *R v Hudson*.[122]

86 The proposition that satisfaction of the three conditions is necessary but not sufficient to justify the reading in of words was echoed by Beazley JA who, in *Taylor v Centennial Newstan Pty Ltd*,[123] said that ‘merely passing through the “gateway” of the three conditions identified by Lord Diplock does not necessarily mean that words can be judicially supplied’.[124] As we discussed above, it is not the case that that proposition has been universally accepted in Victoria.[125]

87 In another passage in *Young* Spigelman CJ further emphasised that any interpretation must be able to be characterised as a construction of the words that actually appear in the statute:[126]

The process by which words omitted by inadvertence on the part of the draftsman may be supplied by the court, must remain capable of characterisation as a process of construction *of the words actually used.*

88 Spigelman CJ expounded on this requirement by stating that a court should confine itself to adopting an interpretation which lies within the range of possible meanings or sphere of operation of the words used:[127]

Where the words actually used are not reasonably capable of being construed in the manner contended for, they will not be so construed ... If a court can construe the words actually used by the Parliament to carry into effect the parliamentary intention, it will do so notwithstanding that the specific construction is not the literal construction and even if it is a strained construction. *The process of construction will, for example, sometimes cause the court to read down general words, or to give the words used an ambulatory operation. So long as the court confines itself to the range of possible meanings or of operation of the text – using consequences to determine which meaning should be selected – then the process remains one of construction.*

89 The two techniques of construction to which he referred – reading down general words and giving words an ambulatory construction – were to be based squarely on the text. An omission by the Parliament was not to be remedied by reading in additional words if those additional words did not reflect the true construction of the words that appeared in the provision.

90 Spigelman CJ reiterated his views in *R v PLV*[128] where the New South Wales Court of Appeal was concerned with an appeal from conviction, one of the grounds of which turned on whether new evidence could be relied on of words said by the complainant to the effect that she had only recently remembered the sexual assaults. The new evidence was relevant only to the complainant’s credibility and the Crown submitted that it was inadmissible by s 102 of the [Evidence Act](#). The appellant sought to rely on an exception to the ‘credibility rule’ under s 106(d) that provided that the credibility rule does not apply to evidence that tends to prove that a witness is, or was, ‘unable to be aware of matters’. The substance of the new evidence was an inability to recall, not an

inability to be aware. The exception under the former section had extended to an inability to recall. In rejecting a submission that s 106(d)

should be read as if it included matters not only of what a witness was unable to be aware but also of matters he or she was unable to recall, Spigelman CJ said:[129]

The suggestion has been made that the omission of the words 'or recall' in s 106(d) may have been inadvertent. ... The issue is whether this Court should construe s 106(d) as if it applied to recollection as well as awareness.

There is a line of authority which suggests that the Court may sometimes 'read words into an Act'. On my reading of the authorities, and I acknowledge that this is not the only possible reading, this is not an accurate description of what is involved in the process of interpretation that is sometimes so described ...

It is no part of the function of a judge to supply words believed to have been omitted by the legislature per se. What a court does is to construe the words actually used by the legislature, with an effect as if certain words appeared in the statute. *The words so 'included' reflect in express, and therefore more readily observable, form, the true construction of the words actually used.*

The task of the courts is to determine what Parliament meant by the words used, not to determine what Parliament intended to say.

91 He went further so as to suggest that words could be read into a statute only if that process reduces, and does not expand, the scope of operation of the provision:[130]

The process remains one of construction if the words actually used by the Parliament are given an effect as *if* they contained additional words. That is not, however, to 'introduce' words into the Act. It is to construe the words actually used. Interpretation must always be text based. The reformulation of a statutory provision by the addition or deletion of words should be understood as a means of expressing the court's conclusion with clarity, rather than as a precise description of the actual process which the court has conducted.

The authorities which have expressed the process of construction in terms of 'introducing' words to an Act or 'adding' words have all, so far as I have been able to determine, been concerned to confine the sphere of operation of a statute more narrowly than the full scope of the dictionary definition of the words would suggest. I am unaware of any authority in which a court has 'introduced' words to or 'deleted' words from an Act, with the effect of *expanding* the sphere of operation that could be given to the words actually used. This was the actual issue in *R v Young*. There are many cases in which words have been *read down*. I know of no case in which words have been *read up*.

The introduction of the words 'or recall' into s 106(d) would expand the sphere of operation of that section. It is not, in my opinion, a permissible process of statutory construction.

92 We do not consider it correct to characterise the process as one of construction of the words actually used. Where the literal meaning of a provision does not give effect to its purpose, the need to depart from the literal

meaning and adopt a construction which will promote the purpose of the provision arises because the 'purpose of the legislation may require a meaning to be placed on the words of a particular provision which, standing alone, they cannot reasonably bear'.^[131] Such a purposive construction is adopted because the literal meaning of the words, which may lack any ambiguity or inconsistency, cannot support a construction that reflects the intended purpose of the legislation. If a literal meaning was open which gave effect to the purpose of the provision, there would be no need to consider departing from that meaning.

93 The proposition that, before a non-literal and purposive construction can be adopted, the words that actually appear in the statute 'must be reasonably open to such a construction'^[132] had been stated in varying ways in *Cooper Brookes (Woolongong) Pty Ltd v FCT*,^[133] *IW v City of Perth*,^[134] *Kingston v Keprose Pty Ltd*,^[135] *Mills v Meeking*,^[136] *Birmingham v Corrective Services Commission of New South Wales*^[137] and *Newcastle City Council v GIO Insurance*.^[138] Lord Diplock had said in *Wentworth Securities Ltd v Jones* that the task 'remains one of construction ... even where this involves reading into the Act words which are not expressly included in it'.^[139] But none of these observations are to the effect that a literal meaning of the words used, even standing in context, must be capable of reflecting the discerned legislative purpose. In referring to the 'contemporary approach', Spigelman CJ considers that, when a purposive construction requires the reading in of additional words, this task can be described as 'literal in total context'.^[140] Recognising the importance of context, he suggests that a literal meaning of the words actually used, taken in context, must be capable of reflecting the discerned legislative purpose, so that in 'all cases, what the court has done is to construe the words actually used in their total context'.^[141] We do not with respect consider that this process is well described as 'literal in total context' because this is to suggest that reading in words affects the literal meaning of the words actually used whereas, in truth, the context of the statutory scheme, and the legislative history, may reveal that it is a departure from the literal meaning of the words used which is justified. While one can say, with justification, that the context may reveal that a certain word should be read in a way in which it would not be read in isolation, it is another thing to say that the context can change the literal meaning of the word.^[142]

94 'Context' as discussed in the above passage from *CIC Insurance*^[143] imports all legitimate means by which the legislative intent may be ascertained. It illuminates the question as to what construction 'is reasonably open'. The statutory scheme, comprising the 'context' and the statute as a whole, may disclose that a particular construction is open, although it is not one which the words used, on their face, can support. Phrases such as the requirement that the words used by the drafter 'must be reasonably open to such a construction', and the choice to be made must be within the 'range of possible meanings' of the text, are to be understood as meaning the words used by the drafter informed by the words to be added or implied. That is to say, the construction under consideration, to be tested against the requirement that it be reasonably open within the statutory scheme, is that of the words that have been found to be omitted together with the words employed by the drafter.

95 This broad approach is reflected in the judgment of Fraser JA in the very recent decision of the Queensland Court of Appeal in *Special Projects (Qld) Pty Ltd v Simmons*.^[144] Citing Young's case^[145] in support of the proposition that the statutory words must themselves be reasonably open to the propounded construction, his Honour qualified the words in the relevant provision even though that construction made the definition wear a very different appearance from its apparently plain words.^[146] His Honour said:^[147]

In a case of this kind, where the literal meaning of the provision departs from the statutory purpose in a way which produces a wholly unreasonable result, a purposive construction may be adopted unless the statutory words are 'absolutely incapable' of bearing that construction in their context.^[148]

Since what is in issue is the meaning of a defined term, it is also relevant to bear in mind that s 32A of the *Acts Interpretation Act 1954* (Qld) provides that definitions in an

Act apply ‘...except so far as the context or subject matter otherwise indicates or requires.’ The Court has previously emphasised that this suggests a flexible approach; it requires regard to be had, not only to context, but also to the subject matter of the provision in which the defined term is used, and it contemplates that application of the definition may be affected not only where it is required by the context, but also where the context or subject matter merely ‘otherwise indicates’.

[149]

Importantly, this is not a case in which the generality of the literal meaning of the definition is merely discordant with statements in the extrinsic material.^[150] As appears from the Chief Justice’s reasons, the apparent generality of the definition is not reconcilable with the objects expressed in the Act and the very sections in which the defined term is used. For that reason, the statutory text itself, read as a whole, may properly be regarded as being ambiguous. It is not ‘absolutely incapable’ of bearing the purposive construction which is the result of the appellant’s argument. It follows that there is no impediment to the Court obeying the command in s 4A of the [Acts Interpretation Act](#) to prefer the interpretation which will best achieve the legislative purpose.

96 Where an alternative construction may be required there will ordinarily be some level of disconformity between the literal meaning of the words actually used, and the statutory scheme. The literal meaning of the words used will either be too narrow to cover an intended purpose or too broad thereby effecting an unintended purpose. In either case the reading in of additional words may be justified if the modification brings the language into conformity with the intended purpose and the modification can be accommodated with the additional words used. This process should not, in our respectful opinion, be described as construing ‘the words actually used’.^[151] It is precisely the deficiency of the words actually used that renders necessary, if the purpose of the Act is to be achieved, the process of identifying ‘the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law’.^[152] It is rather, as Gibbs CJ said in *Cooper Brookes (Wollongong) Pty Ltd v FCT*, that regard must be had to ‘a full view of the Act, considering its scheme and its machinery and the manifest purpose of it’^[153] together with its legislative history to ‘explain ... how the mistake occurred’^[154]. The task must always remain one of interpretation but it is interpretation that derives meaning from the statutory scheme.^[155] In this respect, the process of construction is not construction ‘of the words used’ but rather the process of determining whether the modified construction is reasonably open having regard to the statutory scheme, set against the background that Lord Diplock’s three conditions have been met.

97 Whether a relevant statutory provision is ‘open to such a construction’, involves two considerations. First, whether the words used in the statutory provision can accommodate the words to be read in, or implied, without giving to the provision an unnatural, incongruous or unreasonable construction. Second, the provision as modified must conform with the statutory scheme. While it is said that a ‘reading in’ of the words remains a task of construction that is textually confined within the Act, it is the words as modified which must be reasonably open having regard to the statutory scheme. That is a requirement quite distinct from the three conditions stated by Lord Diplock in *Wentworth Securities Ltd v Jones*.^[156] It is also a requirement that has been applied consistently.^[157]

98 We also respectfully disagree with the view of Spigelman CJ that words can only be introduced into a statutory provision where to do so will have the effect of reducing the scope of operation of the provision. As a matter of principle and authority words may be introduced which expand the operation of the provision. A survey of the

authorities reveal that there have been occasions where a court has found it necessary to read the words used in a statutory provision as if they had an extended operation, in order for the statutory purpose to be achieved.^[158] Those authorities include ones relied on by McHugh JA in *Kingston v Keprose Pty Ltd*.^[159]

99 The statutory provision to be interpreted in *Wiltshire v Barrett*^[160] was s 6(4) of the Road Traffic Act 1960 (UK) under which a police constable was empowered to arrest without warrant a person 'committing an offence' of driving when unfit to drive through drink or drugs. A driver was arrested without warrant but later released without charge. He claimed that the arrest was unlawful because the power under s 6(4) was confined to those circumstances in which the offence was subsequently proven to have been committed. Lord Denning held that just as 'drunk' was construed to mean 'apparently drunk' in *Barnard v Gorman*,^[161] so too, in this statutory context, the words 'committing an offence' meant 'apparently committing an offence'.^[162] As there would be more persons who appeared to be unfit to drive than those who could be proven to be so (just as there would be more persons who appear to be drunk than those whose drunkenness can be established), this construction had the effect of extending the sphere of operation given to the words actually used. The consequence was that a larger number of persons could be arrested without warrant than would have been the case had the strict construction submitted by the driver been adopted.^[163]

100 In *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*^[164] the House of Lords considered what interpretation should be given to s 29(3) of the *Landlord and Tenant Act 1954* (UK) which provided, relevantly, that an application for a new tenancy by a tenant could not be entertained by the court unless it was made not less than two and not more than four months after a previous request for a new tenancy.^[165] The provision was intended solely for the benefit of the landlord. The Court determined that the requirement, being procedural, could be waived by the landlord. It considered that, although the prohibition was expressed in unqualified and unequivocal terms, such an exception gave effect to the purpose of the Act. In so holding, Lord Diplock said:^[166]

Upon the purposive approach to statutory construction this is the reason why in a statute of this character a procedural requirement imposed for the benefit or protection of one party alone is construed as subject to the implied exception that it can be 'waived' by the party for whose benefit it is imposed even though the statute states the requirement in unqualified and unequivocal words. ...

It is ... impossible to arrive at the terms of the relevant exception by the literal approach. This can be done only by the purposive approach, viz., imputing to Parliament an intention not to impose a prohibition inconsistent with the objects which the statute was designed to achieve, though the draftsman has omitted to incorporate in express words any reference to that intention.

101 The effect of the purposive construction was to extend the range of circumstances in which the court could entertain an application by a tenant for a new tenancy when a current lease came to an end.

102 In *R v Oakes*^[167] a penal statute which on its terms relevantly required an offender to have both aided and abetted the commission of an offence under the Official Secrets Act 1920 (UK) 'and' done an act preparatory to the commission of such an offence was held to be susceptible to a purposive construction whereby the word 'and' was to be read as 'or'. Construing the provision as containing a disjunction rather than a conjunction extended the range of offenders who could be held to have committed the offence, a disjunctive reading requiring only one limb of the offending conduct to have occurred, rather than both limbs, for the commission of the offence.

103 *Newcastle City Council v GIO General Ltd*^[168] is another example of the extension of the operation of a statutory provision resulting from the introduction of words into an Act. As mentioned above, the construction adopted by McHugh J was to introduce the words 'because no claim was made against the insured before that

period [covered by the insurance policy] expired' into s 40(1) of the [Insurance Contracts Act](#) with the effect that the protection afforded by s 40(3) of that Act extended to a wider range of policies.

104 The sphere of operation of an Act was enlarged in *MacAlister v The Queen*^[169] where words were substituted for the words employed. As discussed above, in *Victorian Workcover Authority v Wilson*,^[170] Winneke P and Callaway JA rejected a construction of s 104B(9) of the [Accident Compensation Act](#) which confined recourse to a medical panel to a worker who disputed the assessments, and the Court adopted a construction which extended the availability of referral to a medical panel to a worker who accepted the assessments but sought to dispute the medical practitioner's determination as to whether he or she had an injury which was a total loss. So too the sphere of operation of an Act was enlarged by the interpretation of the investigative powers of the Legal Services Commissioner in *Byrne v Marles*^[171] from complaints that, if proved, would amount to unprofessional conduct or misconduct, to complaints where the Commissioner was reasonably satisfied that the conduct alleged would amount to unprofessional conduct or misconduct.

105 In *Carr v Western Australia*^[172] the High Court had to interpret s 570D(2) of the Criminal Code (WA) which governed the admissibility of admissions made by persons accused of certain serious criminal offences. Admissions of an interview were not admissible at trial unless the evidence was videotaped, or there was a reasonable excuse for the absence of a videotape recording, or there were exceptional circumstances.^[173] Section 570D(4) provided that a 'reasonable excuse' included that the accused did not consent to the interview being taped.^[174] An accused gave a formal interview which was videotaped but contained no admissions. He also had an informal conversation in the lockup in which he made admissions. This conversation was also recorded on videotape but without his knowledge. He argued that the informal conversation should not be admitted into evidence on the basis that there should be implied into s 570D an obligation that a suspect must consent to videotaping. The Court held that there was no basis for implying into s 570D such a requirement. In doing so, Gleeson CJ adverted to the assumption that appeared to lie behind s 570D(4), that the consent of a suspected person was necessary if the police were to record an interview, the absence of consent being invariably a 'reasonable excuse' to explain why a videotaped recording had not been made. He characterised the submission of the accused as an attempt to 'elevate the assumption directly into an implied widening of, or addition to, the rule of exclusion stated in s 570D(2)'.^[175] In acknowledging that it was necessary for the accused to show that the exercise for the Court would be one of 'construction and not legislation',^[176] he observed:^[177]

It cannot be said that the implication for which the [accused] contends resolves, consistently with the advancement of the underlying purpose or object of the legislation, some ambiguity in the language of s 570D(2). That is not an end of the matter. Statutory construction is not confined to the resolution of ambiguities in language. Since the object of [his] argument is to add, by implication, a ground of mandatory exclusion of evidence to that stated expressly in s 570D(2), [he] must show (to adopt the modern test) that to confine the grounds of exclusion to that stated in s 570D(2) would defeat the purpose of the statute, or (to adopt a test formulated in earlier times) that to read s 570D(2) according to its terms produces a result contrary to the necessary intentment of the language of the statute.

106 His Honour rejected the proposed construction on the ground that s 570D(2) established a qualified, but specific, rule of exclusion and it could not be said that the underlying purpose of the statutory provision would be defeated unless there was an additional limited rule of exclusion, given that the statutory provision struck a balance between competing interests, protecting citizens against unfair police conduct and protecting the integrity of the administration of criminal justice.^[178] However, in rejecting the construction proffered, Gleeson CJ made no mention of there being an additional insuperable obstacle to its adoption, namely, that it would have extended

rather than reduced the scope of the provision; the construction was not rejected on the basis that it was not a 'reading down' of the provision.

107 It must be accepted, however, that although the proffered construction would have extended the operation of the provision and resulted in its capturing a larger number of recorded interviews, given that the provision was a rule of exclusion this would have resulted in a fewer number of interviews being admissible. This may be seen in one sense as giving to the provision an extended operation, or, in another sense, a 'reading down'. It illustrates that there is little utility in that distinction^[179] and suggests that the 'reading in' of words on a purposive construction should not be confined to those cases where the words reduce the sphere of operation of the provision.

108 In the United Kingdom, amongst the five categories of case that have been recognised as instances where a rectifying construction may be required is that category of case where the text contains a casus omissus (omitted case), so that the literal meaning is narrower than the object and the provision is given a wider scope of operation.^[180]

109 In our view the question whether a construction should be adopted that departs from the literal meaning of the words used in a statutory provision to give effect to the purpose of the provision, and the purpose of the Act, is not one that should be answered by reference to whether or not the construction will 'confine the sphere of operation of a statute more narrowly than the full scope of the dictionary definition of the words would suggest'.^[181] The question should rather be answered by reference to the three conditions set out by Lord Diplock together with the additional requirement that the modified construction is reasonably open. That is to say, it must be possible to 'read in' or imply the additional words into the relevant statutory provision without giving to the provision an unnatural, incongruous or unreasonable construction and the provision as modified must produce a construction that is in conformity with the statutory scheme.

110 We are mindful that our constitutional role in this field is interpretative and that we should abstain from any course that might have the appearance of judicial legislation. A construction which departs from the literal meaning of a provision in order to give effect to the legislative purpose is available even where the words used are clear and unambiguous if the purpose of Parliament is manifest, the error in drafting is plain (be it an omission or mistaken inclusion) and is contrary to the legislative purpose, and the words to be supplied are identifiable with sufficient exactitude.^[182] It will not often be the case that these conditions can be satisfied. But when they are, there should emerge a comprehensive understanding of parliamentary intent and the drafting error. We consider that on the basis of the authorities we have discussed, the prevailing view is that, if those conditions are satisfied, then so long as the words of the section, as modified by the words 'read in', are reasonably open to the alternative construction, that is, if the construction of the provision as modified is not unnatural, incongruous or unreasonable and is consistent with the statutory scheme, the modification to the literal meaning by the reading in of words may be undertaken.

111 We consider that, when those conditions are satisfied, a construction that involves the 'reading in' of words ought not be described as a 'strained' construction.^[183]

(ii) Application of 'reading in' principles to cl 5

112 We consider that here the three conditions set out by Lord Diplock in *Wentworth Securities Ltd v Jones*, and repeated by McHugh J in *Kingstone v Keprose Pty Ltd*, are satisfied. This is a case where the intention of Parliament is plain, the mistake by the draftsman obvious and the additional words can be stated with exactitude.

113 The first condition is met because there could be no doubting that the parliamentary intention of the Amending Act was to replace the old regime of CCTOs, ICOs and CBOs with the regime of CCOs. An examination of its context showed that the relevant purpose of the Amending Act (including cl 5) was to effect a substitution of the new regime for that of the old. This was apparent from the Explanatory Memorandum to the Bill and the Second Reading Speech.^[184] The intended purpose of cl 5 was unmistakable; namely, to ensure that the pre-requisites to a CCO provided for by s 37 applied to CCOs regardless of whether the offence was committed or the finding of guilt was made before or after 16 January 2012, the date on which the CCO regime commenced. Other provisions of the Act, inserted or amended by the Amending Act, also anticipate that CCOs would be available, and implicitly anticipate that the pre-requisites would be applicable, once the old regime was repealed, including s 44, the construction of which is the primary subject of these appeals.

114 The second condition is satisfied because it is readily apparent that Parliament had by inadvertence failed to align the date on which s 37 would apply to a sentence with the date on which the repeal of the old regime took effect. This led to absurd and irrational consequences of one or other of the following three kinds:

(1) on the assumption that s 37 was the source of the power to make a CCO, the absurdity that no CCO might be able to be made until a date in the future when the whole Amending Act is in operation, perhaps as late as 30 June 2013,^[185] with the result that there would be a 'gap' in the availability of intermediate community-based sentencing options for a period of eighteen months, contrary to the sentiment expressed in the Second Reading Speech and contrary to the purpose of the Amending Act.^[186] For a significant period of time this would deprive courts in Victoria of having any sentencing option available to it between a fine and a sentence of imprisonment;^[187]

(2) on the assumption that s 37 was the source of power to make a CCO, and on the assumption that cl 5, as a transitional provision, was confined in its operation to facilitating the change from one legislative regime to another with respect to past conduct (that is, with respect to offences committed, or findings of guilt made, before 16 January 2012), the absurdity that no CCO might be able to be made until a date in the future when the whole Amending Act is in operation with respect to offences committed, or findings of guilt made, before 16 January 2012. This would leave no transitional provision addressing the imposition of sentences for conduct before 16 January 2012 until the whole of the Amending Act came into operation. It would create an unintended discrepancy until perhaps as late as 30 June 2013 between the sentencing options available for offences committed, or findings of guilt made, after 16 January 2012 (which would include CCOs) and those sentencing options available for offences committed, or findings of guilt made, before 16 January 2012 (which would not include CCOs nor would include the other community-based orders of CCTOs, ICOs or CBOs, the enabling provisions having been repealed);^[188] or

(3) on the assumption, which we favour, that s 7(1)(e) is the source of power to make a CCO, the absurdity that, although a CCO could be made from 16 January 2012, the failure of s 37 to be applicable to a sentence until the whole of the Amending Act comes into operation would mean that the essential pre-conditions for the making of a CCO would have no application until that date (at least with respect to offences committed before that date).^[189] This could render the new regime close to unworkable.

115 Any of these three consequences is so surprising and perverse that a construction that leads to it should be rejected.

116 The result of a literal construction of cl 5 would be to risk depriving the courts of the option of imposing a CCO in circumstances in which the option of sentencing under the former regime has been removed. Even if cl 5 is interpreted to govern only the application of s 37 to sentences imposed for offences committed before 16 January 2012, the discrepancy in the range of sentencing options available to a court would depend, in an arbitrary way,

[190] upon the date of the commission of the offence. This would be not only wholly contrary to the legislative purpose of substituting and replacing one regime with another, but also, and significantly, it would be anomalous given that after the whole of the Amending Act comes into operation, a CCO would be able to be imposed regardless of the date on which the offence was committed.

117 Thus, it is plain that by inadvertence the drafter has failed to give effect to the purpose in cl 5. A literal interpretation of the provision provided a clear and unambiguous meaning that was demonstrably contradictory to the purpose of the Amending Act. To give effect to the literal meaning of cl 5 would be, in the words of Fry LJ in *Curtis v Stoven*, [191] to construe the provision 'in order to defeat its object rather than with a view to carry its object into effect'. [192]

118 The third condition is met because it is possible to state with certainty 'what were the additional words that would have been inserted by the draftsman and approved by Parliament had their intention been drawn to the omission before the Bill passed into law'. [193] In cl 5 the words 'of s 21' could be inserted after the words 'after the commencement' and before the words 'of that Act' so that cl 5 would read:

Section 37 as inserted by section 21 of the *Sentencing Amendment (Community Correction Reform) Act 2011* applies to a sentence imposed on or after the commencement **of s 21** of that Act, irrespective of when the offence was committed or the finding of guilt was made.

119 The choice of the words 'of s 21' is reinforced by the terms of the other transitional provisions found in Schedule 3. In particular, cls 2-4 continue the operation of an order, made before the repeal of the former regime, as if the Act, as in force before the commencement of the provisions repealing the relevant sections, remained in force. Clauses 2-4 of Schedule 3 provide as follows:

2 Combined custody and treatment orders

Subject to clause 7 [contravention of a CCTO] and despite the commencement of section 12 of the *Sentence Amendment (Community Correction reform) Act 2011*, an old combined custody and treatment order [194] is taken to continue in force on and from that commencement [that is, the commencement of s 12] as if this Act, as in force before that commencement, continued to apply to it.

3 Intensive Correction Orders

Subject to clause 9 [contravention of an ICO] and despite the commencement of section 15 of the *Sentence Amendment (Community Correction reform) Act 2011*, an old intensive correction order [195] is taken to continue in force on and from that commencement [that is, the commencement of s 15] as if this Act, as in force before that commencement, continued to apply to it.

4 Community-based orders

Subject to clause 10 [contravention of a CBO] and despite the commencement of section 21 of the *Sentence Amendment (Community Correction reform) Act 2011*, an old community-based order [196] is taken to continue in force on and from that commencement [that is, the commencement of s 21] as if this Act, as in force before that commencement, continued to apply to it.

120 As mentioned above,[197] s 12 of the Amending Act repealed the regime governing CCTOs; s 15 repealed the regime governing ICOs and s 21, inter alia, repealed the regime governing CBOs. In each case, in cls 2-4 of Schedule 3 of the Amending Act, reference is made to the specific provision repealing the regime governing CCTOs, ICOs and CBOs, namely, ss 12, 15 and 21 respectively. The date from which an order made before the repeal of that regime is taken to continue to be in force despite that repeal, is the date of the commencement of ss 12, 15 and 21 respectively. That is, there is an exact correspondence between the reference to the specific repealing section and the commencement of that section as the date in relation to which orders made before the repeal are to continue in force.

121 Clauses 7, 9 and 10 create the offences of contravening an 'old CCTO', an 'old ICO' and an 'old CBO'[198] respectively. Where the offence partly occurs before, and partly occurs after, the commencement of the relevant clause, the offence of contravening an 'old CCTO', an 'old ICO' or an 'old CBO' is to be taken 'not to have been committed' but the Act again is to apply as in force before the commencement of ss 12, 15 and 21 respectively; that is, before those provisions applied which repealed the relevant regimes for CCTOs, ICOs, and CBOs, respectively.[199]

122 We consider that cl 5 ought to be construed as reflecting the same symmetry. The addition of the words 'of s 21' before the words 'of that Act' in cl 5 displays the same correspondence as is evident in cls 2-4 and in cls 7, 9 and 10 because cl 5 makes reference to s 37 as inserted by s 21 (s 37 identifying the essential prerequisites of the regime governing CCOs) and s 21 is the provision which introduces the CCO regime.[200] We consider that it is thus the commencement of s 21 to which reference ought be made (and was intended to be made) in cl 5, thus ensuring that the pre-requisites in s 37 apply from the date the CCO regime commences.

123 Furthermore, we consider that the words used by the drafter in cl 5, in the context of the Act as a whole, can accommodate the words to be 'read in' without giving to the provision an unnatural, incongruous or unreasonable construction. The construction of cl 5 as modified is reasonably open on the statute. The additional words are clearly consistent with the statutory scheme. The consequence of reading in the words 'of s 21' into cl 5 is to make the commencement of s 21 (16 January 2012) the time for:

- (1) repeal of the enabling provisions for the making of CCTOs and ICOs;[201]
- (2) modification of the provision that formerly enabled the making of a CBO to enable instead the making of a CCO;[202]
- (3) repeal of the previous regime governing CCTOs, ICOs and CBOs;[203]
- (4) commencement of the new regime governing CCOs;[204]
- (5) identification of those 'old' CCTOs, ICOs, and CBOs whose effect is continued as if the relevant repeal had not occurred;[205] and
- (6) application of the new provisions for offending against such 'old' CCTOs, ICOs and CBOs.[206]

124 Thus, we consider that it is necessary to intervene as the drafting mistake is readily apparent and the anomaly would lead to absurd consequences that could be obviated by giving effect to the unmistakable legislative intent. We are able to say with exactitude that the words that have been omitted from cl 5 are a reference to s 21 of the Amending Act. The language of cl 5, as modified, is reasonably open to that construction. The modified construction is consistent with the statutory scheme of the Amending Act and cl 5 can reasonably accommodate the modification. Accordingly, we have concluded that cl 5 should be so interpreted in order to 'attribute to the provision the meaning which it was obviously intended to have'.[207]

125 As the present case illustrates, it may be difficult to characterise a particular exercise of construction as one that expands or reduces the scope of operation of a provision. The introduction of the words in the present case may be seen as linking the date from which s 37 will apply to a sentence to the commencement of one section of the Amending Act rather than the whole of the Amending Act, and thereby effecting a 'reading down', but equally, and more plausibly, it may be viewed as enlarging the scope of operation of s 37 so that it may now apply to CCOs to which it previously had no application.^[208] Were we to refrain from introducing the omitted words, 'of s 21', because it was considered impermissible to enlarge the scope of operation of a statutory provision, we would defeat the plain object of this provision.

126 We are unable to discern any reason in principle or authority why the introduction of words on a purposive construction should be confined to those cases where the words reduce the sphere of operation of the provision. We have sought to demonstrate in the survey of authorities above that no such limitation has been generally accepted. As the conditions for reading in the words 'of s 21' have been so plainly satisfied in this case (indeed, we consider the case for judicial intervention to be compelling), we consider that cl 5 should be construed in the manner we have described, whether or not by so doing, the provision may be given an enlarged scope of operation.

(iii) The Charter

127 The Solicitor-General and the Commission approached the issues under the Charter in different ways. The Solicitor-General submitted that we should adopt the construction we have favoured on the basis of the ordinary principles of statutory interpretation, which we have done, and urged us to conclude that on the construction we have adopted, cl 5 is compatible with the right not to have a greater penalty imposed than that which applied at the time an offence was committed, under s 27(2) of the Charter. Reliance was placed on the Charter primarily to establish that there was no incompatibility with human rights.

128 By contrast the Commission relied on the Charter to argue that a literal interpretation of cl 5 would be incompatible with the right not to be subjected to arbitrary detention under s 21(2) of the Charter. It submitted that the Court was required by s 32(1) of the Charter to depart from a literal interpretation of cl 5 to avoid that incompatibility, s 32 imposing an obligation to interpret all statutory provisions compatibly with human rights, so far as is possible to do so, and consistently with the purpose of those provisions.^[209]

129 We consider first the submissions made by the Solicitor-General. Section 27(2) of the Charter provides:^[210]

A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

130 The penalty to which s 27(2) refers as 'the penalty that applied to the offence' is the maximum penalty prescribed for the offence. A penalty imposed within that prescribed limit does not offend that requirement. As Lord Carswell said in *Flynn v HM Advocate*,^[211] in a passage he repeated in *R (Uttley) v Home Secretary*, referring to article 7(1) of the European Convention on Human Rights, which is in much the same terms as s 27(2) of the Charter:^[212]

It seems to me difficult to escape the conclusion that the meaning of the provision is that the penalty which was 'applicable' at the time of the criminal offence was committed is that which a sentencer could have imposed at that time, ie, the maximum sentence then prescribed by law for the particular offence. ... The object of the provision appears to have been to prevent a sentence being imposed which could

not have been imposed at the time of the offence, because the maximum was then lower.

131 So too Lord Phillips said:[213]

It follows that article 7(1) will only be infringed if a sentence is imposed on a defendant which is a heavier penalty than that which *could* have been imposed on the defendant under the law in force at the time that his offence was committed.

132 The right under s 27(2) does not require a comparison between the actual penalty imposed and the penalty that would probably have been imposed by the sentencer at the time the offence was committed. As Baroness Hale stated:[214]

It is quite clear that the words ‘penalty ... applicable’ in article 7(1) refer to the penalty or penalties *prescribed by law* for the offence in question at the time when it was committed. It does not refer to the *actual* penalty which would probably have been imposed upon the individual offender had he been caught and convicted shortly after he committed the offence. The court does not have to make a comparison between the sentence he would have received then and the sentence which the court is minded to impose now.

133 If such a comparison was required, the sentencer would need to engage in an unrealistic hypothetical exercise. Lord Carswell observed this would have the effect that:[215]

It would frequently be necessary to attempt to divine what sentence a court would have passed if sentencing at the time of commission of the offence, a quest fraught with obvious difficulties.

134 Here, the maximum applicable to the offence of intentionally causing injury was 10 years, both at the time of the commission of the offence and the time of sentence. It follows that the right under s 27(2) is not engaged by cl 5 on either a literal construction or the purposive construction we prefer. In particular, there is no incompatibility between the construction of cl 5 we have adopted and the right under s 27(2).

135 The Commission submitted that the right which would be engaged by a literal interpretation of cl 5 is the right protected under s 21(2) of the Charter which provides:

A person must not be subjected to arbitrary arrest or detention.[216]

136 In *WBM v Chief Commissioner of Police*[217] the Chief Justice expressed the view that the human rights meaning of the word ‘arbitrary’[218] in the context of the right under the Charter to be protected against ‘arbitrary’ interferences with privacy,[219] reflected the following considerations:[220]

arbitrariness is concerned with capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought.

137 The Commission submitted that, if the literal interpretation of cl 5 had the effect that a CCO was not available as a sentence for the respondents in respect of the offence of intentionally causing injury in circumstances where a CCO would otherwise have been made,[221] and the only sentencing option available was imprisonment by way of immediate incarceration (a fine not being considered appropriate[222]), then the imprisonment would be

'arbitrary', within the meaning of s 21(2), because (1) the withdrawal of a CCO as a sentencing option had not occurred as a result of a policy change but from a mere accidental drafting error and (2) it would have the effect of treating the respondents more harshly than other persons who engaged in 'equivalent' offending at either an earlier or later point in time. In those circumstances, it was submitted, where there was a constructional choice to be made, s 32(1) of the Charter required that the Court depart from the literal interpretation of cl 5 and adopt an interpretation that is compatible with s 21(2) of the Charter by inserting 'of that section' or 'of s 21' after the words 'after the commencement' in cl 5.

138 As the compatible construction proffered by the Commission was the one we have already adopted on ordinary principles of statutory interpretation, and it is a construction we find compelling, there is no need to consider whether s 32(1) of the Charter would have required its adoption. It would have been otherwise if the ordinary principles of statutory interpretation did not yield such a compelling case for departure from the literal meaning of cl 5 and if we had concluded that s 21(2) was engaged. Suffice it to say that the legislative history of cl 5 supports the submission that the lack of availability of a CCO as a sentencing option was the result of a drafting mistake. There are real difficulties, however, in seeking to compare persons who engage in 'equivalent' offending and it could not be said that immediate incarceration would be inappropriate as a sentence to be imposed on offenders convicted of intentionally causing injury, even where the offending conduct resembled in some respects the conduct engaged in here by the respondents. In any event, given the conclusions we have reached on the construction of cl 5, it is unnecessary for us to determine whether the right under s 21(2) of the Charter was here engaged. Nor is this the occasion for us to consider what is the proper approach to be adopted by this Court to the application of s 32(1) of the Charter.^[223]

(iv) Parliamentary intervention to clarify the intended operation of a CCO and to validate orders already made.

139 On 14 August 2012, a week after this Court made the declaration referred to at the outset of these reasons, Parliament confirmed that our construction of cl 5 reflected its intention by introducing the Road Safety and Sentencing Acts Amendment Bill. The Attorney-General in the Second Reading Speech said:^[224]

Sentencing amendments

The bill will also address issues arising from the case of *DPP v. Leys and Leys* that is currently before the Court of Appeal.

The court is considering the power of the courts to impose a combined CCO and jail sentence under section 44 of the *Sentencing Act*. However, its final decision is yet to be handed down. The court has also made a declaration as to the interpretation of the transitional provisions regarding the CCO and its availability.

The bill will put beyond doubt the intended operation of those powers for future sentencing orders and validate any court orders and decisions, and any consequences of such orders or decisions, made in reliance on or in relation to those powers.

Commencement of the community correction order

The bill will confirm, consistent with the Court of Appeal's declaration last week in the *Leys* case, that the CCO has been available as a sentencing option on and from 16 January 2012.

The CCO was introduced into the *Sentencing Act* by section 21 of the Sentencing Amendment (Community Correction Reform) Act 2011 (CCO Act), which commenced

by proclamation. The clear intention of the Parliament was that the CCO regime should replace existing community-based orders from the time of commencement in early 2012, as is clear from the second-reading speech and explanatory memorandum.

However, to avoid any doubt, the bill amends the transitional provision in clause 5 of schedule 3 of the [Sentencing Act](#). The reference to the commencement of 'that Act' in clause 5 will be replaced with a reference to the commencement of 'section 21 of the CCO Act'. *While the Court of Appeal has already declared that the transitional provision should be read as referring to section 21 rather than to the CCO act as a whole, the bill places Parliament's intention beyond doubt.*

Similarly, for the avoidance of doubt, the bill confirms that the CCO was available as a sentencing option for any sentence handed down on or after 16 January for an offence irrespective of when the offence was committed or when the finding of guilt was made.

140 The Road Safety and Sentencing Acts Amendment Act 2012, assented to on 17 August, contains the following relevant provisions:

12 Amendment of clause 5 in Schedule 3

In clause 5 of Schedule 3 to the [Sentencing Act 1991](#), for 'that Act' substitute 'section 21 of that Act'.

13. New Part 4 inserted in Schedule 3

At the end of Schedule 3 to the [Sentencing Act 1991](#) insert—

**'PART 4—ROAD SAFETY AND SENTENCING ACTS AMENDMENT ACT 2012—
VALIDATIONS**

18. Validation of certain community correction orders

(1) A community correction order made or purported to have been made on or after 16 January 2012 and before the day on which the *Road Safety and Sentencing Acts Amendment Act 2012* receives the Royal Assent has, and is taken always to have had, the same force and effect as it would have had if section 12 of that Act had been in operation when the order was made or purported to have been made.

(2) For the avoidance of doubt, a community correction order may be made in respect of an offender sentenced on or after 16 January 2012, irrespective of when the offence was committed or the finding of guilt was made.

(3) A community correction order referred to in subclause (1) and a sentence of imprisonment (irrespective of the period of imprisonment and whether or not the sentence is suspended in whole or in part) that are imposed on an offender in exercise, or purported exercise, of a power under section 44 (as then in force) are not invalid by reason only of failure to comply with section 44.

(4) Any act or thing done or omitted to be done, whether under a power conferred by or under an enactment or otherwise, before or after the commencement of section 13

of the *Road Safety and Sentencing Acts Amendment Act 2012* in reliance on or in relation to—

(a) a community correction order that is validated by subclause (1) or (3) or a sentence of imprisonment that is validated by subclause (3); or

(b) a contravention or alleged contravention of an order or sentence referred to in paragraph (a)—

including any penalty imposed, has the same effect, and gives rise to the same consequences, and is to be regarded as always having had the same effect and having given rise to the same consequences, as if section 12 of the *Road Safety and Sentencing Acts Amendment Act 2012* had been in operation and section 44 of this Act (as then in force) had been complied with.

(5) A right or liability conferred or imposed in relation to, or affected by—

(a) a community correction order that is validated by subclause (1) or (3) or a sentence of imprisonment that is validated by subclause (3); or

(b) a contravention or alleged contravention of an order or sentence referred to in paragraph (a)—

including any penalty imposed, is exercisable or enforceable, and is to be regarded as always having been exercisable or enforceable, as if section 12 of the *Road Safety and Sentencing Acts Amendment Act 2012* had been in operation and section 44 of this Act (as then in force) had been complied with.

(6) Without limiting subclause (5), the rights and liabilities conferred or imposed in relation to a community correction order include rights of appeal.

(7) This clause does not affect the right of any person to appeal against a sentence that includes a community correction order on any other ground.

(8) This clause and the amendment of clause 5 of this Schedule by section 12 of the *Road Safety and Sentencing Acts Amendment Act 2012* do not affect the rights of the parties in the proceedings known as *DPP v Tyson Jason Leys*; *DPP v Dillon Thomas Leys* (No. S APCR 2012 0054 and No. S APCR 2012 0055).^[225]

141 By s 2 of the Road Safety and Sentencing Acts Amendment Act 2012, s 12 came into operation on 16 January 2012. Clause 18(8), inserted by s 13 of that Act was introduced in apparent observance of the sub judice rule to avoid any Parliamentary interference with the determination of the proceedings before this Court. It has therefore remained necessary to determine the question of the construction of cl 5, and the application of s 37 to CCOs, for the purpose of the present appeals.

B. Construction of s 44 of Act

142 There was no argument during either plea regarding the construction of s 44 – on which these appeals now turn. Counsel for both respondents suggested that a combination of a suspended sentence with another type of order, such as a CCO, was a viable and desirable sentencing disposition. Neither provided any useful guidance on how such a combination of orders could be imposed nor did the Director take any exception to the exchanges between the respondents' counsel and the sentencing judge on the issue.

143 The sentencing judge subsequently indicated, without any prejudgment, that the combination of terms of imprisonment with 'intermediate' sentencing orders may be a viable option in relation to each respondent. Despite this intimation, neither counsel made any submission on whether such a discretion was open to his Honour at the time of sentencing or within the confines of a proper construction of s 44 of the Act.

144 We now turn to the original subject matter of these appeals under cover of ground 1.^[226] We agree with the Director's contention that the sentencing judge erred in construing s 44(2) of the Act. The Director submitted two alternate constructions of s 44 and each respondent submitted further different constructions of the provision.

Alternative constructions of s 44

145 The Director's alternate interpretations of the section each have the same result for the purposes of both appeals. The result of his first and primary interpretation is that the sentencing judge breached s 44(1) as a consequence of imposing suspended sentences on the respondents. On this view, sub-s (1) of s 44 only permits the combination of a term of imprisonment not exceeding three months with a CCO where the term of imprisonment is not suspended. Such a term of imprisonment may relate to one offence, including the same offence that attracts the CCO, or be composed of multiple terms of imprisonment that each relate to different offences. The purpose of s 44(2) is merely to clarify that in the case of two or more custodial sentences of imprisonment imposed on a single offender under s 44(1), the aggregate of those terms of imprisonment cannot exceed three months. In this case, so the Director submitted, the total effective sentences imposed on both respondents were defective because they were each (wholly) suspended and because they each exceeded three months in aggregate.

146 In the alternative, the Director contends that the sentencing judge contravened s 44(2), because sub-s (2) of s 44 prohibits the imposition of a CCO on one offence in proceedings where at least two terms of imprisonment are imposed on separate offences and the aggregate of those terms of imprisonment exceeds three months, irrespective of whether or not that term of imprisonment is (wholly or partly) suspended or not. On this view, the sentencing judge did not contravene sub-s (1) of s 44 because that provision was concerned with the combination of a CCO with a term of imprisonment with respect to a single offence. In each case, the sentencing judge imposed two terms of imprisonment on two separate offences and a CCO on a discrete third offence – namely, intentionally causing injury. Irrespective of whether or not those sentences of imprisonment were wholly or partly suspended, the aggregate of those terms of imprisonment exceeded three months. Accordingly, the imposition of a CCO, though it be on a separate, third, offence, was prohibited in each case. We agree with the construction accorded to sub-ss (1) and (2) of s 44 under cover of this alternative contention.

147 The difference between the submissions is made evident by the different constructions of s 44(1). Under the first interpretation, the Director submits the sub-section is not limited to the combination of a term of imprisonment and a CCO on a single offence. Rather, it also extends to any term of imprisonment, comprising multiple terms of imprisonment imposed on any number of offences, in addition to a CCO imposed on any other offence, including one or more of the offences attracting a term of imprisonment, provided that the term of imprisonment does not exceed three months and is not suspended in whole or part. On this basis, s 44(2) merely confirms that where there are multiple terms of imprisonment, the three month cap on the terms of imprisonment referred to in s 44(1) applies on the aggregate of the multiple terms of imprisonment and not only on the 'total effective sentence' comprising of the separate terms of imprisonment subject to orders for concurrency or cumulation. It followed that the mischief s 44(2) was designed to address would arise in cases where sentencing judges sought to impose a CCO in addition to multiple immediate terms of imprisonment on multiple other offences, but make orders for concurrency and cumulation such that the total effective sentence did not exceed three months. This submission proceeded on the basis that despite the substantial similarity in wording between s 44(1) and the former s 36(2) of the Act, the former should be accorded a different meaning. This, it was submitted, was justified at least partly on

the basis of the different sentencing regimes concerned and the structural composition of the current Act, compared with the repealed provisions surrounding the former s 36(2).

148 Both of the Director's submissions assume either some difference or some degree of equivalence between the meaning of this repealed provision and the current s 44(1). Accordingly, we make some brief observations about the legislative history of the former s 36(2) and its judicial interpretation. The section regulated the imposition of a CBO. In its original form s 36 relevantly provided:

Division 3—Community-based orders

36 When court may make community-based order

(1) A court may only make a community-based order in respect of an offender if—

- (a) it has convicted the offender, or found the offender guilty, of an offence or offences punishable on conviction by imprisonment or a fine of more than 5 penalty units; and
- (b) it has received a pre-sentence report; and
- (c) the offender agrees to comply with the order.

(2) A court may make a community-based order in respect of an offender in addition to sentencing the offender to a term of imprisonment of not more than 3 months.

149 In *R v Young*^[227] the Full Court was concerned with whether a sentencing judge was permitted to impose a term of imprisonment contemplated by s 36(2) on any offence for which an offender was convicted, or only in respect of an offence in relation to which a CBO was imposed under s 36(1).^[228] *Crockett and Ashley JJ* concluded that the latter interpretation was the better one.^[229] A subsidiary issue of whether or not suspended sentences were contemplated by s 36(2) was also raised. While *Crockett and Ashley JJ* found it was unnecessary to decide this issue, they nonetheless 'assumed' that the provision did embrace suspended sentences.^[230] However, *Nathan J*, dissenting in the result, did consider that issue and concluded that the term of imprisonment contemplated by s 36(2) included a wholly or partly suspended term:^[231]

In my view no difficulty of interpretation arises. Any sentence of imprisonment whether suspended in whole or in part is to be taken as a term of imprisonment. There is no distinction in my view in the Act between the expressions 'a term of imprisonment' or 'a sentence of imprisonment'...

The result in my view conforms with the philosophy of the Act. A community-based order is not an option available to a sentencer if, in respect of one set of proceedings or upon a single presentment, the person upon conviction is sentenced to a period of imprisonment in excess of three months whether suspended or otherwise. It may be there would be some social merit in providing the sentencer with an option to impose a community-based order when a suspended sentence is imposed, regardless of the suspended period. However, I do not believe that any artifice of reasoning or construction permits that position to be attained as the Act now stands.

150 Not long after this decision s 36 was amended by ss 18 and 19 of the Sentencing and Other Acts (Amendment) Act 1997 that took effect on 1 September 1997.^[232] Following the amendment made by s 18, s 36(2) provided:^[233]

(2) A court may make a community-based order in respect of an offender in addition to sentencing the offender to a term of imprisonment of not more than 3 months

provided that the sentence of imprisonment is not—

(a) ordered to be served by way of intensive correction in the community; or

(b) suspended in whole or part.

151 The Second Reading Speech of the Sentencing and Other Acts (Amendment) Act noted various technical clarifications of provisions within the Act^[234] and the Explanatory Memorandum to the specific amendment to s 36(2) stated:^[235]

clause 18 amends section 36(2) of the Principal Act to clarify that a Community Based Order (CBO) must not be imposed in conjunction with either an Intensive Correction Order or a sentence of imprisonment which is wholly or in part suspended. That is, the term of imprisonment of not more than 3 months referred to in sub-section (2) must involve immediate incarceration.

152 It is apparent from this legislative history and the judicial consideration of the unamended s 36 in *R v Young*^[236] that the amended s 36(2) was not intended to embrace suspended sentences. That s 44(1) is substantially identical to the amended s 36(2) and that the latter provision dealt with ancestral non-custodial sentencing regimes countenances a legislative will to ensure a consistency of interpretation.^[237] The contextual re-orientation of the former s 36(1) into what is the current structural equivalent in s 37 does not, in our view, warrant according s 44(1) such a different construction to the former s 36(2) as the Director contends by his primary submission.

153 Under the Director's primary submission, s 44(2) does not, in and of-itself, sanction or address the suspended or immediate nature of any terms of imprisonment within its scope – this is covered by s 44(1). On this view, suspended sentences in excess of three months were prohibited under s 44(1): s 44(2) merely clarified that if the imposed term of imprisonment was comprised of multiple terms of imprisonment, the cap of three months applied to the aggregate of those terms and not any total effective sentence resulting from orders for concurrency or cumulation on the multiple terms of imprisonment. Since we would reject the Director's primary construction of s 44(1), it is unnecessary to consider the merits of his submission in relation to how s 44(2) should be construed on his primary submission.

154 The respondents resist the Director's submissions on the basis that the correct construction of s 44 permitted the sentencing judge to combine aggregate terms of imprisonment with a CCO, because the terms of imprisonment were wholly suspended. While each respondent made different submissions, none of them were expressly contradictory and we will treat them indiscriminately. Their preferred construction of s 44 proceeds on a number of grounds, including: reliance on the maxim of statutory interpretation *expressio unius*; the subordination of s 44(2) to s 44(1); the distinction between receiving a term of imprisonment and 'serving' a term of imprisonment; and the furtherance of the objectives of the Act by removing limitations on a court's power to combine suspended sentences with CCOs.

155 The respondents rely heavily on the express reference to suspended sentences in s 44(1) and the absence of that reference in s 44(2). In this respect, the respondents are drawing on the maxim of statutory interpretation that an express reference to one matter in a statutory provision, and its absence in another statutory provision, indicates that the matter is excluded in the latter provision.^[238] But, as is often said about that maxim, and others like it,^[239] it is a useful servant but a dangerous master.^[240] As is evident from our reasons, the interpretive value of this maxim is considerably limited in the construction of s 44 because the express references to 'term(s) of imprisonment' in s 44(1) and (2) includes reference to a suspended sentence. Inclusion of the final grammatical clause in s 44(1) can be explained in light of the legislative history to the predecessor of s 44(1), s 36(2), and the

judicial consideration of it, which we have explained above. It does not follow that the omission of words to the same effect in s 44(2) must therefore necessarily indicate a legislative intent to exclude suspended sentences from the ambit of the latter. To arrive at such a conclusion would be to elevate the maxim of expression unius to a status beyond a mere aid to interpretation.

156 Before proceeding to the Director's alternative construction, it is instructive to consider particular aspects of the construction proposed by the respondent, Tyson  **Leys** . This is because it does, in some respects, support the primary construction of s 44(1) proposed above by the Director. Tyson  **Leys**  contended that unlike the former s 36(2), the current s 44(1) was not limited to the combination of a non-custodial correction order with a term of imprisonment on a single offence, but also applied where multiple offences were charged. He submitted the words 'subject to sub-s (2)' at the commencement of s 44(1) imparted a broader scope of operation to s 44(1) than that understood by the majority in *R v Young*. This submission relied on the principle of statutory construction that all words in legislation are to be construed as having some meaning and effect.^[241] He submitted that because, when s 36(2) was operative, there was no provision, like s 44(2), which existed in relation to sentencing offenders to multiple terms of imprisonment in combination with community-based orders, the predecessor to s 44(1) was only concerned with mixed dispositions relating to the single offence. However, he submitted, since s 44(2) now deals with sentencing offenders involved in multiple offences, the words 'subject to sub-section (2)' could only have some operation or purpose if s 44(1) was itself concerned with multiple offences.

157 This submission fails to appreciate that there may be an overlap between the current s 44(1) and s 44(2) without having to depart from the construction of the predecessor to s 44(1) set out in *R v Young*. Such a situation may arise where, for example, a CCO and an immediate term of imprisonment are imposed on a single charge; at least one other term of imprisonment, be it immediate or suspended, is imposed on a separate count; and the total effective sentence comprising both terms of imprisonment does not exceed three months. In that case, s 44(2) would preclude the imposition of the total effective sentence, to the extent that it is comprised of two terms of imprisonment that exceed three months in aggregate, notwithstanding that the total effective sentence does not exceed three months because of orders for cumulation or concurrency. Construing the provision on the basis that the words 'subject to sub-section (2)' at the outset of s 44(1) are to be given some meaning and effect, there is a potential for overlap between s 44(1) and s 44(2), without having to accord s 44(1) a broader construction than that attributed to its predecessor. Furthermore, it is a well known convention of statutory drafting that the phrase 'subject to' and similar expressions do no more than express which statutory provision should prevail in the event of an inconsistency: 'where there is no clash the phrase does nothing: if there is collision, the phrase shows what is to prevail. The phrase provides no warranty of universal collision'.^[242] In *Re Bland Bros and the Council of the Borough of Inglewood (No 2)* the Full Court considered the words preceding a contested statutory provision in the form of 'Notwithstanding anything in this Act contained'.^[243] Irvine, Cussen and McArthur JJ said: ^[244]

As to the introductory words, the section should first be construed without them, and then, if there is anything in the other provisions of the Act inconsistent with the interpretation so arrived at, these other provisions must yield.

158 Taken in that light, s 44(1), construed as the majority interpreted its predecessor, s 36(2), in *R v Young*, and s 44(2), each have fields of operation independent of the other: the effect of the latter is not merely to qualify the operation of s 44(1); and nor is it merely to clarify that the cap of three months on an immediate term of imprisonment under s 44(1) applies to the aggregate of all terms of imprisonment imposed in a single proceeding.

159 The preferred construction of s 44(1) submitted by Tyson  **Leys**  was also informed by a desire to avoid defeating the operation of s 44(2). In this respect, he also supported the Director in his primary submission.

Senior counsel submitted that if s 44(1) were given a narrow meaning, such that it only applied to a mixed disposition for a single offence, neither s 44(1) nor s 44(2) could govern certain scenarios. Examples include a two charge indictment where a sentencing judge imposes a term of imprisonment, potentially exceeding three months, on one charge and a CCO on the second; and a multiple charge indictment where the sentencing judge imposes a CCO on one offence and an aggregate sentence under s 9 of the Act, potentially exceeding three months, on all the other offences. In light of s 38(2)(b)[245] and s 44(3),[246] it is evident that Parliament contemplated such scenarios may arise; however, it is also clear that s 44(1) neither enables the exercise of the sentencing discretion in such a fashion and nor does s 44(2) prohibit it. These are arguable sentencing scenarios that may fly in the face of an apparent Parliamentary intent to minimise the concurrency of sentences of imprisonment and CCOs, let alone suspended sentences of imprisonment and CCOs. Senior Counsel for Tyson  **Leys**  argued these gaps or lacuna only existed if a narrow construction were accorded to s 44(1), in accordance with the construction of the former s 36(2) in *R v Young*. In this respect, construing s 44(1) as a provision applying to multiple offences, instead of the combination of a CCO with a term of imprisonment on a single offence, precluded the emergence of such lacunae.

160 The key to the distinction between the construction favoured by the respondent, Tyson  **Leys** , and the Director's primary construction of s 44(1) is that the latter assumes the last grammatical clause in that sub-section, namely, 'if the sentence of imprisonment is not suspended in whole or in part', is a necessary prerequisite to the term of imprisonment involved,[247] whereas the former proposes that those words are merely descriptive of the sentence of imprisonment contemplated – which is susceptible to the presupposition that without those words a term of imprisonment may encompass suspended and immediate terms of imprisonment. The respondent Tyson  **Leys**  interpretation relies on the discretionary nature of the power granted under s 44(1), indicated by terms such as 'a court may make a community correction order'. [248] On that basis, it is implied that the non-suspended and immediate nature of the sentence of imprisonment contemplated is merely descriptive.[249] Section 44(1) merely regulates the maximum length of a term of imprisonment imposed in a proceeding where a CCO is also imposed, (to the extent that, or) 'if the sentence of imprisonment is not suspended in whole or in part'. Accordingly, his reading of s 44(1) entitles him to construe the next sub-section as one concerned only with immediate terms of imprisonment. He bolsters that construction by seizing on the word 'release' in s 44(3), which, it was submitted, indicates that the term of imprisonment contemplated in s 44(2) involves immediate incarceration. The result of his submission is that s 44 in its entirety concerns itself with dispositions involving CCOs and immediate terms of imprisonment, but does not prohibit or regulate in any way the imposition of suspended sentences of imprisonment in combination with, or in proceedings involving, CCOs.

161 The Director in his primary submission, on the other hand, envisages a construction that requires that any term of imprisonment imposed in combination with a CCO must be immediate and must not exceed three months, rather than that the sentences of imprisonment must not exceed three months, if they are immediate. From the perspective of the respondent, Tyson  **Leys** , the Directors' position would have been advanced if, for instance, the final grammatical clause in s 44(1) was in terms such as: 'but only if the sentence of imprisonment is not suspended in whole or in part'. It is for that reason that the Director proceeds to construe s 44(2) on the basis that it can only apply to immediate terms of imprisonment, because it only purports to clarify the nature of the cap of the maximum duration of imprisonment set out in s 44(1).

162 As mentioned above, Senior Counsel for Tyson  **Leys**  seized on the word 'release' in s 44(3) to construe the 'term of imprisonment' in s 44(2) as an immediate custodial sentence. He acknowledged that without s 44(3), the 'term of imprisonment' contemplated by s 44(2) might either mean suspended or immediate. However, the 'release of the offender from imprisonment' contemplated under s 44(3) suggests that it is release from an immediate, custodial, term of imprisonment. If the words in s 44(3) were not given this meaning, so it was

said, sub-s (3) of s 44 would be superfluous, or otherwise highly rarefied in scope. We do not accept that construction. The submission ignores the complexion thrown on the words 'term of imprisonment' in s 44(2) by s 44(1). If it were not for the final grammatical clause in s 44(1), the 'term of imprisonment' contemplated under sub-s (1) could be either immediate or suspended. Hence the concluding words of s 44(1), that the sentence of imprisonment be 'not suspended in whole or in part', prescribes that the imprisonment contemplated by s 44(1) be immediate.

163 The Director's alternative submission proceeded on the basis that an aggregated term of (immediate) imprisonment exceeding three months could not be combined with a CCO due to the plain meaning of s 44(2). This much was uncontroversial; however, the Director then argued that sub-s (2) of s 44 included aggregated terms of imprisonment whether or not they were suspended in whole or part. The suspended or immediate nature of an aggregated term of imprisonment under sub-s (2) is not expressly contemplated by the terms of the sub-section and is the key issue in the contest between the respondents and the Director in both appeals. If sub-s (2) includes aggregated terms of imprisonment that are wholly or partly suspended, then the Director's alternative construction of s 44 is the better one. If on the other hand it does not, as the sentencing judge was inclined to find, then the respondents' preferred construction of s 44 would prevail.

164 There are various considerations supporting the Director's alternative construction. First, in the context of the Act as a whole, the notion of a suspended sentence is clearly intended to fall within the ambit of a sentence or term of imprisonment. For instance, sub-ss (5) and (8) of s 27 are in the following terms:

(5) A wholly suspended sentence of imprisonment must be taken to be a sentence of imprisonment for the purposes of all enactments except any enactment providing for disqualification for, or loss of, office or the forfeiture or suspension of pensions or other benefits.

...

(8) A partly suspended sentence of imprisonment must be taken for all purposes to be a sentence of imprisonment for the whole term stated by the court.

165 It is instructive to note these provisions were relied on by Nathan J in *R v Young* in forming the view that the language of a 'term of imprisonment' in the former, unamended, s 36(2) necessarily contemplated terms of imprisonment that were suspended in whole or part. While *Crockett and Ashley JJ* did not decide this issue, they nonetheless 'assumed' that the provision did embrace suspended sentences. As mentioned above, it was partly in response to these intimations on the meaning of s 36(2) that the Parliament amended s 36(2) to clarify that it did not include suspended sentences.

166 Contrary to the position advanced in *R v Young* and sub-ss (5) and (8) of s 27, the respondents submit the language of a 'term of imprisonment' in s 44(2) does not include a suspended sentence because such a term is not required to be 'served'.^[250] In this respect, the respondents point to provisions in the Act such as ss 15, 16, 29, 33 and 83AR.^[251] However, this submission proceeds on the fallacy of equating a suspended sentence with the suspension of service of a sentence due to the offender escaping from custody or having been at large during a corresponding period of imprisonment. Provisions in the Act which require the suspension of service of a custodial or other sentence do not describe or prescribe the nature of a suspended sentence, but rather the suspension of service during a term of imprisonment. Examples include sub-ss (2)-(4) of s 17.^[252] Furthermore, the use of the term 'service' in relation to a term of imprisonment is not exclusively related to a period of immediate custodial incarceration. Under s 7(1)(c), an offender found guilty of an offence may be required to 'serve a sentence of imprisonment that is suspended by [a court] wholly or partly'.^[253]

167 Second, the language of s 44(1) only contemplates combining a CCO with a single, immediate, term of imprisonment of less than three months in respect of a single charge. The use of the indefinite article to preface a 'term of imprisonment' followed by the definite article to preface the 'sentence of imprisonment' indicates, from a grammatical point of view, that there is an intention to particularise one specific sentence or term of imprisonment as the subject of s 44(1). A term or sentence of imprisonment in a general or an indefinite sense, is not the grammatical subject of the clause, but a particular instantiation or definite form of that general type of term or sentence. While it is true that an expression in the form of a singular does not exclude reference to the plural, [254] it does not follow in this instance in respect of s 44(1). In addition to the grammatical structure of the provision, it contrasts with the clearly pluralistic language of s 44(2). The plain words of s 44(2) are limited to more than one offence attracting an aggregated term of imprisonment. Since the respondents in these cases each received aggregated terms of imprisonment, s 44(1) could not apply, whereas s 44(2) did.

168 Third, the intention behind the legislation introducing s 44 was to treat suspended sentences and CCOs together as falling into the category of intermediate methods of punishment – less serious than immediate terms of imprisonment but more onerous than fines and similar punishments. Accordingly, so it was said, it would not be consistent with the legislative intent behind s 44 to impose a CCO in conjunction with a suspended term of imprisonment, unless the latter was of a less serious nature of less than three months.

169 The sentencing judge appreciated the statutory intention to encourage reliance on CCOs rather than suspended sentences, but his Honour nonetheless incorrectly combined the two. The Amending Act inserted a number of other provisions into the Act that formed part of the new CCO regime. As described above, the purpose of the amendments included replacing disparate 'intermediate' sentencing orders, such as the CCTOs, ICOs and CBOs with a single new CCO.[255] A CCO is designed to provide a single flexible sentencing option that enables judges to tailor sentences suitable to a particular offence and a particular offender,[256] to the extent that the offending behaviour calls for greater punishment than a fine, but less serious punishment than imprisonment. An important aspect of the legislative motivation behind the Amending Act was to encourage courts, where appropriate, to impose CCOs rather than suspended sentences. In the Second Reading Speech, it was said: [257]

The Sentencing Advisory Council, in the Suspended Sentences -- Final Report -- Part 2, noted that the overuse of suspended sentences in Victoria is at least partly due to the failings of intermediate sentencing orders.

The new CCO introduced in this bill will replace these orders with a single comprehensive and highly flexible order. The bill draws on several recommendations made by the council in its final report to create a new intermediate order.

...

A CCO sits between imprisonment and fines in the sentencing hierarchy.

...

Instead of using the legal fictions of imposing a term of imprisonment that is suspended or served at home, the courts will now openly sentence offenders to jail or, where appropriate, use the CCO to openly sentence the offender to a community-based sentence. Unlike the CCTO and ICO, which are technically sentences of imprisonment, the CCO is a community-based sentence. There is no legal fiction involved.

The CCO can be combined with a jail sentence, but it will not pretend to be one. The CCO is a transparent sentence that can be understood by everyone in the community.

170 Fourth, the Explanatory Memorandum to the section draws no distinction between the prohibition on a suspended sentence applying to s 44(1) and it applying to s 44(2):[\[258\]](#)

New section 44 allows a court to make a CCO in addition to sentencing an offender to jail for three months or less. The CCO commences upon release from imprisonment. A term of imprisonment does not include a suspended sentence. The maximum of three months jail applies to an aggregate jail sentence and jail terms that operate cumulatively (in whole or part), concurrently (in whole or part), and to the total effective sentence of imprisonment. An example is if an offender is found guilty of armed robbery and sentenced to 2 months jail, followed by a CCO of 12 months. Upon release from jail, the offender is subject to the CCO.

171 Perhaps one consideration weighing against adoption of the Director's alternative construction arises from a potential lacuna or gap in the possible sentencing scenarios canvassed by sub-ss (1), (2) and (3) of s 44. It is conceivable, for example, that in a single proceeding involving two charges, a sentencing judge may wish to impose a CCO on one charge and a suspended or immediately custodial term of imprisonment on the second that exceeds three months.[\[259\]](#) Under s 44(3), to the extent that the sentence of imprisonment is not suspended in whole or part, the CCO would commence upon expiry of the period of incarceration.

172 Section 44(2) prohibits the imposition of a CCO on a single offender sentenced to multiple terms of imprisonment for multiple offences and where the aggregate of those terms of imprisonment exceeds three months. On the other hand, in accordance with the construction of the provisions considered in *R v Young*, s 44(1) only contemplates the combination of a term of imprisonment and a CCO in relation to the one offence – being the type of offence in relation to which the court is entitled to impose a CCO under s 37. The sentencing judge below imposed the CCO on each respondent with respect to the charges in contravention of s 18 of the *Crimes Act*[\[260\]](#) but imposed terms of imprisonment alone in relation to the other two offences each respondent had committed, a term of imprisonment (wholly suspended) of 18 months and 12 months respectively for Tyson  **Leys**  and Dillon  **Leys**  for contravention of s 17 of the *Crimes Act*[\[261\]](#) and 12 months and 9 months' imprisonment respectively in relation to the common law offence of affray. His Honour fell foul of the prohibition in s 44(2) quite independently of contravening or failing to comply with s 44(1). Only to the extent, if any, that s 44(2) comes into conflict with the enabling provision of s 44(1),[\[262\]](#) will s 44(2) prevail over the former, and it did not do so here.

173 There is a further source of extrinsic evidence that we may take into account in construing s 44. As we mentioned above, following the oral hearing of the appeals a number of amendments were made to the Act. A new s 44 was substituted for the provision presently under consideration. In the Second Reading Speech on 14 August 2012 introducing the Road Safety and Sentencing Acts Amendment Bill 2012, the Attorney-General said:
[\[263\]](#)

Combined community correction order and imprisonment

The Court of Appeal has ruled that the sentences imposed in the  **Leys**  case were unlawful because they contravened section 44 of the *Sentencing Act*. In that case, the offenders had been given suspended sentences of imprisonment combined with a CCO.

The bill amends [section 44](#) to put beyond doubt that a court may impose a combined CCO and jail sentence provided the term of imprisonment is three months or less, and that [section 44](#) only allows the combination of a CCO with an actual term of imprisonment, not with a suspended sentence.

Uncertainty has also arisen about whether the power to combine a jail sentence and a CCO applies to cases where the offender is found guilty of more than one offence. For the avoidance of doubt, the bill will amend [section 44](#) to clarify that courts may impose a combined CCO and jail sentence irrespective of whether the offender is found guilty of one or more offences punishable by imprisonment.

Validation of sentences imposed

The amendments made by the bill reflect what has always been the intention of the act. However, alternative readings of the operation of [section 44](#) have led to courts taking a different approach to the combination of a CCO with a suspended sentence.

The result is that a number of sentences have been made since 16 January that contravene the terms, as intended, of the act. These sentences were imposed by courts exercising their sentencing discretion in accordance with the guiding principles of the [Sentencing Act](#). It would unduly disrupt the courts and the community corrections systems if the legal status of these sentences were left unclear or offenders needed to be re-sentenced.

For this reason, the bill confirms that sentencing combination orders made since 16 January 2012, and the legal consequences flowing from those orders, are not invalid by reason of a failure to comply with [section 44](#). This retrospective validation will only apply to sentencing combinations that offend [section 44](#) and that were imposed before the date this bill commences. In accordance with usual practice, the bill will not apply to the case before the Court of Appeal.

The validating provisions of the bill preserve the rights and liabilities conferred or imposed in relation to validated CCOs and contraventions of those CCOs, including rights of appeal. For example, the offender and the Director retain the right to appeal against a sentence that includes a CCO on any other ground.

Thus, this remedial bill will ensure that there is minimal disruption to the operation of the justice system arising from legislative oversights in the [Road Safety Act](#). It will also clarify the availability and intended operation of the CCO, while ensuring that sentences already imposed are not disturbed.

174 The relevant new provisions are in these terms:

8. Substitution of section 44

For [section 44](#) of the [Sentencing Act 1991](#) substitute —
‘44 Imprisonment and a community correction order

(1) When sentencing an offender in respect of one, or more than one, offence, a court may make a community correction order in addition to imposing a sentence of imprisonment only if—

(a) any sentence of imprisonment imposed on that occasion in relation to any offence is not suspended; and

(b) the sum of all the terms of imprisonment to be served (after deduction of any period of custody that under [section 18](#) is reckoned to be a period of imprisonment or detention already served) is 3 months or less.

(2) [Section 27\(5\)](#) does not apply to this section.

(3) If a court makes a community correction order in respect of an offender in addition to imposing a sentence of imprisonment in accordance with this section, the community correction order commences on the release of the offender from imprisonment.'

9. [Section 116A](#) repealed

[Section 116A](#) of the [Sentencing Act 1991](#) is repealed.

10. New sections 147 and 148 inserted

At the end of [Part 12](#) of the [Sentencing Act 1991](#) insert—

'147 Transitional provision—Sentencing Amendment (Community Correction Reform) Act 2011

Schedule 3 has effect.

148 Transitional provision—Road Safety and Sentencing Acts Amendment Act 2012

(1) Section 38 as amended by section 7 of the Road Safety and Sentencing Acts Amendment Act 2012 applies to a sentence imposed on or after the commencement of section 7 of that Act, irrespective of when the offence was committed or the finding of guilt was made.

(2) Section 44 as substituted by section 8 of the Road Safety and Sentencing Acts Amendment Act 2012 applies to a sentence imposed on or after the commencement of section 8 of that Act, irrespective of when the offence was committed or the finding of guilt was made.

(3) Despite subsections (1) and (2), the amendment of section 38 by section 7 of the Road Safety and Sentencing Acts Amendment Act 2012 and the substitution of section 44 by section 8 of that Act do not affect the rights of the parties in the proceedings known as *DPP v Tyson Jason*  **Leys** ; *DPP v Dillon Thomas*  **Leys**  (No. S APCR 2012 0054 and No. S APCR 2012 0055).'

175 By virtue of s 148(3) it has remained necessary for this Court to determine the question of construction.

Conclusion as to the construction of s 44(1)

176 On the correct construction of s 44(2), the sentencing judge was not entitled to make a CCO on any charge as the aggregate term of imprisonment on the other charges exceeded three months. It does not matter whether the sentences were to be served immediately or were wholly or partly suspended. The duration of all of the terms

of imprisonment were to be aggregated. The Director has made out the ground of appeal that the sentence imposed on each of the respondents in respect of charge 2 was unlawful.

177 Turning to the second of the Director's grounds of appeal, namely, that the sentences imposed are manifestly inadequate, we consider there to be considerable force in the Director's contentions that the sentences imposed were manifestly inadequate. However it is unnecessary for us to finally determine this ground. It was accepted on the appeals that the consequence of ground one being made out was that the entire sentencing discretion must be re-opened.

C. Re-sentencing the respondents

178 Double jeopardy considerations no longer have any role to play at any stage of the appellate consideration of a Director's appeal against sentence.[264] In DPP v Karazisis[265] the court observed that a number of the discretionary considerations that arise from a Director's appeal remain however. If the respondent to such an appeal is required to be re-sentenced by an appellate court it is obliged to deal with the offender in light of the circumstances which exist at the time of the appeal. Sentencing aspects such as delay, parity, rehabilitation and on occasions totality require consideration.[266]

179 Both applicants are young offenders and they have now been at large for over two and a half years since offending. It is more than seven months since they were sentenced. They have completed a large proportion of the community work components of their CCOs. They have complied with the other conditions imposed under those orders, although in Dillon  **Leys**  case this compliance came haltingly at first. There was powerful evidence at the plea hearing and before this Court of rehabilitation. This rehabilitation has been significantly progressed during their time at large.

180 This was a violent, frightening episode which could easily have resulted in a tragedy. Were we sentencing the respondents at first instance we would have had little hesitation in imposing immediate and significant terms of imprisonment. [267] As we have observed, however, we are required to re-sentence them in the light of their current circumstances. We consider, after all that has occurred and all that has been achieved by the respondents towards their rehabilitation, that the community's interests are best served by allowing the process of rehabilitation to continue. We propose to re-sentence them as follows:

Tyson James **Leys**

Charge 1 –
Recklessly causing
serious injury

18 months' imprisonment (base
sentence).

Charge 2 –
Intentionally causing
injury

6 months' imprisonment, 3
months cumulative on charge 1.

Charge 3 – Affray

12 months' imprisonment, 6
months cumulative on charges 1
and 2.

Total effective sentence 2 years and 3 months imprisonment, wholly suspended for 2 years and 3 months from 13 February 2012.

Dillon Thomas  **Leys** 

Charge 1 – Recklessly causing serious injury	12 months' imprisonment (base sentence).
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Charge 2 – Intentionally causing injury	4 months' imprisonment, 2 months cumulative on charge 1.
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Charge 3 – Affray	9 months' imprisonment, 6 months cumulative on charges 1 and 2.
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Total effective sentence 1 year 8 months' imprisonment, wholly suspended for 2 years from 13 February 2012.

[1] While there were two separate appeals, they were heard at the same time.

[2] Act No 65 of 2011.

[3] See s 21 of Amending Act, located in Part 2, which, inter alia, introduced new ss 36-48Q into the Act; Victoria, *Gazette: Special*, No S 423, 21 December 2011, 3. The Proclamation of Commencement dated 21 December 2011 fixed 16 January 2012 as the day on which Part 2 (other than s 49), s 68, Part 5 (other than ss 96 and 101 to 106), Part 6 and Part 7 of the Amending Act and the Schedule to the Amending Act came into operation.

[4] See for example, Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) ('Pearce and Geddes') [6.4].

[5] Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011, 3289-3295 (Robert Clark, Attorney-General).

[6] Section 27(2) provides: 'A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed'.

[7] Section 1(1) of the *Charter of Human Rights and Responsibilities* provides: 'This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act'. The convention is to refer to an Act by its short title (as expressed in the Charter by s 1.1) and there is thus no need to refer to the Charter as the 'Charter of Human Rights and Responsibilities Act': see *Interpretation of Legislation Act*, s 10(1)(e); *Deming No 456 Pty Ltd v Brisbane United Development Corporation Pty Ltd* [1983] HCA 44; (1983) 155 CLR 129, 162 (Wilson J).

[8] Upon intervention, the Attorney-General became a party to the appeal: [s 34\(2\)](#).

[9] Upon intervention, the Commission became a party to the appeal: [s 40\(2\)](#).

[10] (1995) 81 A Crim R 70.

[11] *Ibid* 71.

[12] Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011, 3289-3295 (Robert Clark, Attorney-General).

[13] [1963] HCA 22; (1963) 109 CLR 276, 280.

14. [14] Section 114(1) of the Act provides: 'If an Act (including this Act) ... increases the penalty or the maximum or minimum penalty for an offence, the increase applies only to offences committed after the commencement of the provision effecting the increase'. Section 114(2) is in similar terms with respect to reductions in the penalty or the maximum or minimum penalty for an offence.

[15] Emphasis added.

[16] The Solicitor-General argued that it is of the nature of a transitional provision, regardless of its terms, that it speaks only to conduct which has occurred in the past to facilitate the change from one statutory regime to another. See *Bennion on Statutory Interpretation: A Code* (Butterworths, 5th ed, 2008) s 96, 314–5 ('*Bennion on Statutory Interpretation*'); *R v Secretary of State for Social Security; ex parte Britnell* (1991) 1 WLR 198, 202; *Australian Meat Industry Employees Union v Hamberger* [2000] FCA 1197; (2000) 102 FCR 74, 94 [42]; *R v Sayers* (1997) 96 A Crim R 76, 82–3. See also *Yates v State of Western Australia* [2008] WASCA 144, [53]–[54] (Steytler P).

[17] This assumes some significance in our discussion of whether words can be 'read into' cl 5. See below [113]–[115].

[18] It is arguable that s 117(1) would have empowered a sentencing judge to impose a CCO on each respondent because, on one view, the provisions empowering the imposition of CCOs (s 7(1)(e)) commenced after s 117(1); but on the Solicitor-General's view that s 37 was the source of power to impose a CCO, cl 5 of Schedule 3 to the Act has the effect that it cannot apply to a sentence (and this would include the making of a CCO) with respect to conduct that occurred before 16 January 2012 until the commencement of the Amending Act as a whole.

[19] See Pearce and Geddes [7.9]–[7.13].

[20] Victoria, *Gazette: Special*, No. S 423, 21 December 2011.

[21] Section 5 is also in Part 2 of the Amending Act fixed to commence on 16 January 2012 by the Proclamation of 21 December 2011.

[22] Amending Act, s 54 -Schedule 3 cl 12.

[23] Explanatory Memorandum, [Sentencing Amendment \(Community Correction Reform\) Bill 2011](#), 5.

[24] Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011, p 3291–2 (Robert Clark, Attorney-General).

[25] *Inco Europe Ltd v First Choice Distribution* [1998] EWCA Civ 1460; [1999] 1 All ER 820, 823 (Hobhouse LJ).

[26] *Tickle Industries Pty Ltd v Hann* [1974] HCA 5; (1974) 130 CLR 321, 331 (Barwick CJ, with whom McTiernan J agreed).

[27] *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231.

[28] In those circumstances the construction adopted is both the 'literal' and 'purposive' construction.

[29] (1987) 11 NSWLR 404, 423.

[30] *Project Blue Sky v ABA* [1998] HCA 28; (1998) 194 CLR 355, 389 [69] (McHugh, Gummow, Kirby and Hayne JJ); *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40; (2009) 238 CLR 642, 649 [5] (French CJ, Bell J).

[31] [1998] HCA 28; (1998) 194 CLR 355.

[32] *Ibid* 381 [69] (footnotes omitted).

[33] [1955] HCA 27; (1955) 92 CLR 390.

[34] *Ibid* 397.

[35] (1997) 187 CLR 384.

[36] *Ibid* 408 (citation omitted).

[37] *Bennion on Statutory Interpretation*, 986; *Fitzgerald v Masters* [1956] HCA 53; (1956) 95 CLR 420, *Adams v Lambert* [2006] HCA 10; (2006) 228 CLR 409, 417 [21], *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40; (2009) 238 CLR 642, 651–2.

[38] *Director of Public Prosecutions (Nauru) v Fowlers* [1984] HCA 48; (1984) 154 CLR 627, 630.

[39] See *Cooper Brookes (Wollongong) Pty Ltd v FCT* [1981] HCA 26; (1981) 147 CLR 297, 310 (Stephen J).

[40] See *Cooper Brookes (Wollongong) Pty Ltd v FCT* [1981] HCA 26; (1981) 147 CLR 297, 306 (Gibbs CJ); 312 (Stephen J); 322 (Mason and Wilson JJ).

[41] [1981] HCA 26; (1981) 147 CLR 297.

[42] *Ibid* 304.

[43] *Ibid* 306 (adopting the words of Earl Loreburn in *Drummond v Collins* [1915] AC 1011, 1017).

[44] *Ibid* 306.

[45] *Ibid* 315.

[46] *Ibid* 322–3.

[47] *Ibid* 320 (referring to the remarks of Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* [1920] HCA 54; (1920) 28 CLR 129, 161–162). See also Stephen J to the same effect at 313.

[48] *Ibid* 320, 321.

[49] Ibid 335, 336.

[50] [1984] HCA 48; (1984) 154 CLR 627.

[51] Ibid 629–630.

[52] (1987) 11 NSWLR 404.

[53] Ibid 421–4.

[54] [1980] AC 74.

[55] Ibid 105–106 (citation omitted).

[56] (1987) 11 NSWLR 404, 422 (citation omitted, emphasis added).

[57] Ibid 422.

[58] Ibid 423.

[59] (1988) 15 NSWLR 292, 302. See also Hope JA to the same effect at 299–300. This was in the context of s 28(6)(b) of the *Prisoners (Interstate Transfer) Act 1982* (NSW).

[60] Ibid 300 (Hope JA); 302 (McHugh JA). Mahoney JA agreed with Hope JA and McHugh JA (at 301) but considered that the same result could flow from an appropriate construction of s 28(2)(b).

[61] [1997] HCA 53; (1997) 191 CLR 85, 113. The reasoning of the other judges, Brennan CJ, Toohey, Gaudron and Gummow, differed in this regard although all five judges reached the same result.

[62] Ibid 114.

[63] Ibid 114.

[64] Ibid 116, citations omitted, emphasis added.

[65] Ibid 116. This had the effect that s 40(1) was to be read as if it said: ‘This section applies in relation to a contract of liability insurance the effect of which is that the insurer’s liability is excluded or limited by reason that notice of a claim against the insured in respect of a loss suffered by some other person is not given to the insurer before the expiration of the period of the insurance cover provided by the contract *because no claim was made against the insured before the period expired*’.

[66] Ibid 113.

[67] [1997] HCA 30; (1997) 191 CLR 1, 12.

[68] [1997] HCA 53; (1997) 191 CLR 85, 113.

[69] [1990] HCA 15; (1990) 169 CLR 324.

[70] Ibid 330. Section 77 of the *Penalties and Sentences Act* provided: ‘If under s 70(b) a court orders that a person in default be imprisoned [where an offender defaults in the payment of a monetary penalty or of any instalment under an instalment order], an appeal lies from that order in the same manner as if that order were a sentence imposed by that court on convicting that person of an offence ...’. Section 567 of the *Crimes Act 1958*

provided that a person convicted on indictment or for a relevant summary offence may appeal to the Full Court with leave. Only some sentences imposed by the County Court gave rise to a right to apply for leave to appeal. Mr MacAlister was convicted in the County Court on indictment of handling stolen goods and ordered to pay a fine by instalments. The instalments were not paid and he was sentenced to a term of imprisonment under s 70(b). The High Court held that the order made against Mr MacAlister was to be treated as a sentence in respect of the offence of handling stolen goods and thus the Full Court had jurisdiction to hear an application for leave to appeal against his sentence.

[71] [1990] HCA 6; (1990) 169 CLR 214.

[72] Ibid 224–7. The majority (Mason CJ, Brennan and Toohey JJ) considered that ‘motor vehicle’ in s 49(1)(f) of the *Road Safety Act* did not refer only to a motor vehicle that had been involved in an accident.

[73] Ibid 235.

[74] [1997] HCA 30; (1997) 191 CLR 1, 12.

[75] [1990] HCA 6; (1990) 169 CLR 214, 243.

[76] [1991] HCA 21; (1991) 172 CLR 1, 21–3.

[77] Ibid 22.

[78] Ibid 22.

[79] At 875.

[80] [2000] UKHL 15; [2000] 2 All ER 109.

[81] Ibid 115.

[82] Ibid 115.

[83] Ibid 115.

[84] Ibid 114.

[85] Under s 9 of the *Arbitration Act 1996*. Section 9 was silent as to whether an appeal could be brought.

[86] [2000] UKHL 15; [2000] 2 All ER 109, 114–5.

[87] Ibid 115. See also *R (on the application of Haw) v Secretary of State for the Home Department* [2005] EWHC 2061; [2006] QB 359, 368–70 [42]–[46].

[88] See *Taylor v Centennial Newstan Pty Ltd* [2009] NSWCA 276; (2009) 76 NSWLR 379, 393 [55] (Beazley JA).

[89] [2000] UKHL 15; [2000] 2 All ER 109, 115 (citations omitted, emphasis added).

[90] [2004] VSCA 161; (2004) 10 VR 298.

[91] Ibid 300 [3], 301 [6].

[92] Ibid 306–307, [26]–[27], [29].

[93] Ibid 306 [25].

[94] Ibid 306 [27].

[95] [2005] VSCA 261; (2005) 12 VR 437.

[96] Ibid 443–444 [23] (Buchanan JA).

[97] Ibid 443 [23]: '[t]he increase in the penalising effect of an award of interest may have been made to spur on employers, Victorian WorkCover Authority and self-insurers to ordinarily act speedily and carefully in dealing with claims for weekly payments and compensation, thereby increasing the prospect that injured workers will receive timely compensation'. (Buchanan JA).

[98] Ibid 442 [19]. The appellant's submission would have required reading, in the context of [s 114E\(1\)\(b\)](#) of the *Accident Compensation Act*, the words 'the amount of outstanding weekly payments' as if it read 'the amount of each outstanding weekly payment', the words 'from the day on which the incapacity commenced' would become 'from a day a weekly payment fell due', and the words 'after the deduction of income tax and the amount of payments recoverable pursuant to the provisions of the *Social Security Act 1991* (Cth)' would have had to be added.

[99] [2005] VSCA 261; (2005) 12 VR 437, 441–442 [18] (emphasis added).

[100] Ibid 443 [21] (emphasis added).

[101] Ibid 439 [4].

[102] Ibid 447 [43].

[103] [2008] VSCA 78; (2008) 19 VR 612.

[104] With whom Dodds-Streeton JA and Coghlan AJA agreed.

[105] [2008] VSCA 78; (2008) 19 VR 612, 628 [54].

[106] Ibid 628 [54].

[107] Ibid 628 [54].

[108] [2012] VSCA 105.

[109] Nettle and Osborn JJA, Cavanough AJA.

[110] [2012] VSCA 105, Nettle JA [15], Osborn JA [38], Cavanough AJA [68].

[111] Sections 158 and 159 of the *Criminal Procedure Act*.

[112] [2012] VSCA 105 [16], citing *Wentworth Securities Ltd v Jones* [1980] AC 74, 105–6; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 423; *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681, 687–8 and Pearce & Geddes, [2.33]–[2.35].

[113] [2012] VSCA 159, [39] (footnotes omitted).

[114] Ibid [39].

[115] [1999] NSWCCA 166; (1999) 46 NSWLR 681; 107 A Crim R 1.

[116] Ibid 686 [9], 687 [13].

[117] *Bermingham v Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292; *Saraswati v R* [1991] HCA 21; (1991) 172 CLR 1, 21–2 (McHugh J and Toohey J); *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* [1998] HCA 78; (1998) 196 CLR 53, 81 [73] (Kirby J); *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1, 20; *Parramore v Duggan* [1995] HCA 21; (1995) 183 CLR 633, 644; *Nominal Defendant v Ravenscroft* [2007] QCA 435; [2008] 2 Qd R 32; *Foster v Cameron* [2011] QCA 48; *Victorian WorkCover Authority v Wilson* [2004] VSCA 161; (2004) 10 VR 298; *R v Firms* [2001] NSWCCA 191; (2001) 51 NSWLR 548, 562 [66]–[67] (Mason P, Hidden J agreeing); *Austral Monsoon Industries Pty Ltd v Pittwater Council* [2009] NSWCA 154; (2009) 75 NSWLR 169, 182 [68] (Spigelman CJ, McColl JA and Handley AJA agreeing); *Taylor v Centennial Newstan Pty Ltd* [2009] NSWCA 276; (2009) 76 NSWLR 379; *R v Byerley* (2010) 107 SASR 517, 545 [109]; *Director of Consumer Affairs Victoria v Glenwill Pty Ltd* [2009] VSC 76, [21] (Kaye J).

[118] [1999] NSWCCA 166; (1999) 46 NSWLR 681, 691 [37] (Spigelman CJ); see also to the same effect 741 [318] (James J), 704 [124] (Beazley JA), 721 [217] (Abadee and Barr JJ).

[119] Ibid 686 [5]–[6] (footnotes omitted, emphasis added).

[120] Ibid 687 [11]–[12] (emphasis added).

[121] Ibid 739–40 [308].

[122] [2007] NZCA 363.

[123] [2009] NSWCA 276; (2009) 76 NSWLR 379.

[124] Ibid 393 [53] (Giles and Basten JJA agreeing).

[125] See in particular the observations made by Callaway JA in *Victorian WorkCover Authority v Wilson* [2004] VSCA 161; (2004) 10 VR 298, 306 [27] and in *Victorian Workcover Authority v Vitoratos* [2005] VSCA 261; (2005) 12 VR 437, 439 [5] referred to in [75] and [78] above.

[126] [1999] NSWCCA 166; (1999) 46 NSWLR 681, 687 (emphasis added).

[127] Ibid 687–688 [15] (emphasis added).

[128] (2001) 51 NSWLR 736.

[129] Ibid 742–743 [78]–[82] (emphasis added). See also, to the same effect, *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681, 687 [14].

[130] (2001) 51 NSWLR 736, 743–744 [87]–[89] (original emphasis).

[131] *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 422.

[132] *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681, 687 [12].

[133] [1981] HCA 26; (1981) 147 CLR 297.

[134] [1997] HCA 30; (1997) 191 CLR 1.

[135] (1987) 11 NSWLR 404.

[136] [1990] HCA 6; (1990) 169 CLR 214.

[137] (1988) 15 NSWLR 292.

[138] [1997] HCA 53; (1997) 191 CLR 85.

[139] [1980] AC 74, 105.

[140] *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681, 687 [13], 688 [18].

[141] *Ibid* 688, [16].

[142] See *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681, 687 [13]–[14], 688 [18].

[143] See above, [47].

[144] [2012] QCA 205.

[145] The following decisions of the Queensland Court of Appeal were also cited by way of example: *Ravenscroft v Nominal Defendant* [2007] QCA 435; [2008] 2 Qd R 32, 49 [44], *Witheyman v Simpson* [2011] 1 Qd R 170, 190 [49], *Sevmere Pty Ltd v Cairns Regional Council* [2009] QCA 232; [2010] 2 Qd R 276, [53]–[62], [71], and *Smith v Ash* [2010] QCA 112; [2011] 2 Qd R 175, 185 [36].

[146] The question on appeal was whether the *Land Sales Act 1984* (Qld) applied to lots of land which had been partly resumed and vested in the Crown or whether a resumption fell to be regulated by the *Acquisition of Land Act 1967* (Qld). The Court (Chief Justice, Fraser JA and Mullins J) held that the *Land Sales Act* had no application in a resumption situation despite the land falling within the literal definition of ‘proposed allotment’ in the *Land Sales Act*. Fraser JA concluded that the definition of ‘proposed allotment’ which meant land shown on a plan of survey registered under the *Land Act 1994* (Qld) or the *Land Title Act 1994* (Qld) could be construed as if it were qualified by an exception for the case where the registration of a new plan of survey was required only as part of a single allotment being compulsorily resumed under the *Acquisition of Land Act*.

[147] *Ibid* [25]–[27].

[148] In support of that proposition his Honour cited *Luke v Inland Revenue Commissioners* [1963] AC 557, 577, quoted in *MacAlister v The Queen* [1990] HCA 15; (1990) 169 CLR 324, 330.

[149] In support of that proposition his Honour cited *Conde v Gilfoyle* [2010] QCA 109, [20].

[150] In support of that proposition his Honour cited *Re Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514, 517–518; *Newcastle City Council v GIO General Ltd (t/as GIO Australia)* [1997] HCA 53; (1997) 191 CLR 85, 113; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27, 46–47.

[151] See the adoption by Beazley JA of the same approach as Spigelman CJ in *Taylor v Centennial Newstan Pty Ltd* [2009] NSWCA 276; (2009) 76 NSWLR 379, 393 [52]. By contrast see the recognition by Nettle JA in *Byrne v Marles* [2008] VSCA 78; (2008) 19 VR 612, 628 [54] that sometimes it is a matter of ‘read[ing] into an Act of Parliament words which are not there’. To the same effect see Nettle JA in *DPP v Guariglia* [2012] VSCA 105, [16].

[152] *Wentworth Securities Ltd v Jones* [1980] AC 74, 105.

[153] [1981] HCA 26; (1981) 147 CLR 297, 306.

[154] Ibid 306. See also Mason and Wilson JJ, 320.

[155] Ibid 304, 320, 322, 323.

[156] Although it may be implicit in the three conditions because the additional words to be inserted will seek to give effect to the purpose of the Act which the literal meaning of the words actually used did not; the additional words being those the Parliament would have inserted had the drafter been made aware of the error. This should ensure that the construction adopted is consistent with the statutory scheme and reasonably open on the statute.

[157] See the authorities cited at [93] above.

[158] See for example *R v Antonio Di Maria* [1996] SASC 5882; (1996) 67 SASR 466.

[159] (1987) 11 NSWLR 404. McHugh JA referred, inter alia, to *Wiltshire v Barrett* [1966] 1 QB 312, *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, and *R v Oakes* [1959] 2 QB 350.

[160] [1966] 1 QB 312.

[161] [1941] AC 378, 387. See also *Wiltshire v Barrett* [1966] 1 QB 312, 327 (Davies LJ).

[162] [1966] 1 QB 312, 321. To the same effect see Davies LJ 328–329; Salmon LJ, 333.

[163] Emphasis was given to the purpose of the Act to protect the safety of all road users.

[164] [1971] AC 850.

[165] Section 29(3) read: ‘No application under section 24(1) of this Act [an application by a tenant to the court for a new tenancy] shall be entertained unless it is made not less than two nor more than four months after the giving of the landlord’s notice under section 25 of this Act or, as the case may be, after the making of a tenant’s request for new tenancy’.

[166] [1971] AC 850, 881–2. To the same effect see Lord Reid, 859–860, Lord Morris, 862, and Lord Pearson, 877, (Viscount Dilhorne dissenting).

[167] [1959] 2 QB 350. The relevant section was s 7 of the *Official Secrets Act 1920* (UK) which provided: ‘Any person who attempts to commit any offence under the principal Act or this Act, or solicits or incites or endeavours to persuade another person to commit an offence, *or aids or abets and does any act preparatory to the commission of an offence* under the principal Act or this Act, shall be guilty of a felony or a misdemeanour or a summary offence according as the offence in question is a felony, a misdemeanour or a summary offence, ...’. (emphasis added).

[168] [1997] HCA 53; (1997) 191 CLR 85.

[169] [1990] HCA 15; (1990) 169 CLR 324, 330.

[170] [2004] VSCA 161; (2004) 10 VR 298.

[171] [2008] VSCA 78; (2008) 19 VR 612.

[172] [2007] HCA 47; (2007) 232 CLR 138.

[173] Section 570D(2) provided: 'On the trial of an accused person for a serious offence, evidence of any admission by the accused person shall not be admissible unless – (a) the evidence is a videotape on which is a recording of the admission; or (b) the prosecution proves, on the balance of probabilities, that there is a reasonable excuse for there not being a recording on videotape of the admission; or (c) the court is satisfied that there are exceptional circumstances, which, in the interests of justice, justify the admission of the evidence'.

[174] Section 570D(4) provided: 'For the purposes of subsection (2), 'reasonable excuse' includes the following – ... (c) The accused person did not consent to the interview being videotaped'.

[175] [2007] HCA 47; (2007) 232 CLR 138, 146 [15].

[176] Ibid 144 [10], citing *Wentworth Securities Ltd v Jones* [1980] AC 74; *Inco Europe Ltd v First Choice Distribution* [2000] UKHL 15; [2000] 1 WLR 586; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404; *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681.

[177] [2007] HCA 47; (2007) 232 CLR 138, 146–147 [17].

[178] The other members of the majority of the Court also rejected the implication of a requirement of consent to videotaping the interview: see 160–161 [68]–[73] (Gummow, Heydon and Crennan JJ, on the basis that absence of consent only become relevant under the section in the absence of a videotape).

[179] See further below [108] and [125].

[180] Bennion on Statutory Interpretation, 877.

[181] *R v PLV* (2001) 51 NSWLR 736, 743 [88] (Spigelman CJ).

[182] See, for example, *Pravidur v Scental Pacific Pty Ltd* [2010] VSCA 144; (2010) 28 VR 60, 79 [76] where such matters could not be established.

[183] We consider that the expression a 'strained construction' to be a misnomer as it suggests that the construction to be adopted is unnatural, incongruous or unreasonable, or inconsistent with the statutory scheme, and yet the preferred construction should be none of those things.

[184] Set out [38] and [39] above, respectively.

[185] As mentioned above, by which time the whole of the Amending Act will have come into operation by reason of s 2(4) of the Amending Act, in the absence of any earlier Proclamations.

[186] As explained above, this consequence would follow because although s 37 commenced operation on 16 January 2012 (by reason of the Proclamation of 21 December 2011), cl 5 of Schedule 3 would have the effect that s 37 would not apply to a sentence until the commencement of the Amending Act as a whole and this would include, on the assumption that s 37 was the source of power to make a CCO, the making of a CCO.

[187] As was argued for by Dillon  **Leys** .

[188] This was the submission made by the Solicitor-General on behalf of the Attorney-General.

[189] This was the position adopted by the DPP. The consequences of a failure of the pre-conditions to apply were discussed in [27] above.

[190] See *WBM v Chief Commissioner of Police* [2012] VSCA 159 [89]–[123].

[191] (1889) 22 QBD 513.

[192] Ibid 519.

[193] *Wentworth Securities Ltd v Jones* [1980] AC 74, 105.

[194] An 'old combined custody and treatment order' is defined as a combined custody and treatment order within the meaning of s 3(1) as in force before the commencement of s 12 of the *Sentencing Amendment (Community Correction reform) Act 2011*, being an order in force immediately before that commencement': Sch 3, cl 1.

[195] An 'old intensive correction order' is defined as an intensive correction order within the meaning of s 3(1) as in force before the commencement of s 15 of the *Sentencing Amendment (Community Correction Reform) Act 2011*, being an order in force immediately before that commencement': Sch 3, cl 1.

[196] An 'old community-based order' is defined as a community-based order within the meaning of s 3(1) as in force before the commencement of s 21 of the *Sentencing Amendment (Community Correction Reform) Act 2011*, being an order in force immediately before that commencement': Sch 3, cl 1.

[197] See [34] above.

[198] As defined in Sch 3 cl 1.

[199] Sch 3, cl 12, as mentioned above, [36], n 22.

[200] Although the insertion of the words 'section of the' after 'commencement of that' in cl 5 would achieve the same object, we consider that 'of s 21' better reflects the symmetry of cls 2–4.

[201] Section 5 of the Amending Act, repealing s 7(1)(ab) and s 7(1)(b) of the Act.

[202] Section 5 of the Amending Act, modifying s 7(1)(e).

[203] Sections 12, 15 and 21 of the Amending Act respectively.

[204] Section 21 of the Amending Act.

[205] Clauses 2–4 of Schedule 3 to the Amending Act.

[206] Clauses 7, 9 and 10 of Schedule 3 to the Amending Act.

[207] *DPP (Nauru) v Fowler* [1984] HCA 48; (1984) 154 CLR 627, 630.

208. [208] On the assumption that s 7(1)(e) is the source of power to make a CCO. Alternatively, the modified construction will enable CCOs to be made with respect to offences committed, or findings of guilt made, before 16 January 2012, on the assumption that s 37 is the source of power.

[209] This includes the purpose of the statute as a whole as s 3 of the Charter relevantly defines 'statutory provision' to mean an Act or a provision of an Act.

[210] Section 27(2) is in similar terms to article 15(1) of the *International Covenant on Civil and Political Rights* ('the ICCPR') that, inter alia, provides: 'Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed'. Section 27(2) of the Charter is also similar to article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of

Rome on 4 November 1950 (the 'European Convention on Human Rights'), included in Schedule 1 to the *Human Rights Act 1998* (UK). Article 7(1) provides: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. *Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed*'. (emphasis added)

[211] [2004] UKPC D1; 2004 SCCR 281, 315–6 [109].

[212] [2004] UKHL 38; [2004] 1 WLR 2278, 2296 [62], accepting the submission of Mr Pannick QC for the Secretary of State.

[213] *R (Uttley) v Home Secretary* [2004] UKHL 38; [2004] 1 WLR 2278, 2284 [21] (original emphasis) referring also to article 7(1) of the European Convention on Human Rights. To the same effect see 2288 [39] (Lord Rodger) and see the concurring opinion of Lord Steyn, 2280 [1].

[214] Ibid 2291 [45] (original emphasis).

[215] Ibid 2297 [64]. The equivalent guarantee in the *New Zealand Bill of Rights Act 1990* is s 25(g) which provides that everyone who is charged with an offence has '[t]he right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty'. In *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26; [2005] 3 NZLR 1, the Supreme Court of New Zealand held that s 25(g) was concerned with variations in the maximum applicable penalty prescribed by law for the generic offence: see 24 [29] (Gault J); 30 [57], 36 [79] (Blanchard J); 37–38 [85]–[87] (Tipping J); 42–43 [112]–[114] (Henry J); (Elias CJ dissenting).

[216] The right is modelled on article 9 of the ICCPR; article 9(1) provides: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'. Section 21(2) is in similar terms to s 22 of the *New Zealand Bill of Rights Act* and article 5 of the European Convention.

[217] [2012] VSCA 159.

[218] [2012] VSCA 159, [117], that is, the meaning adopted based on the understanding of the right at international and comparative law. This stands in contrast with the dictionary definition of the term, being 'a decision or action, which is not based on any relevant identifiable criterion, but which stems from an act of caprice or whim' ([99]).

[219] Section 13(a).

[220] [2012] VSCA 159, [114]. See [98]–[114]. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] FCAFC 70; (2003) 126 FCR 54, 90 [143]–[146] in the context of 'arbitrary' detention under article 9 of the ICCPR.

[221] As is evident from the sentences actually imposed by the County Court. However, this puts to one side the question of whether, in any event, a CCO could properly have been imposed on the respondents given the constraints under s 44.

[222] Given that the judge of the County Court had determined to impose a CCO, which must have reflected an assessment that the conduct warranted more than a fine.

[223] See *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1; *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506, 534 [27], 535–536 [29], 548 [70], 549 [72], 550–551 [78]; *Noone v Operation Smile (Australia) Inc* [2012]

VSCA 91 [24]–[30] (Warren CJ and Cavanough AJA); [139]–[142] (Nettle JA).

[224] Victoria, *Parliamentary Debates*, Legislative Assembly, 14 August 2012, 3004 (Robert Clark, Attorney-General) (emphasis added).

[225] The indictment and the notice of appeal incorrectly referred to Tyson James  **Leys**  as Tyson Jason  **Leys** . The Court was only advised of this error on 12 December 2012, the date of judgment. On that date, the Director of Public Prosecutions was granted leave to amend the necessary court documents to reflect the correct name of the respondent, Tyson James  **Leys** . The *Road Safety and Sentencing Acts Amendment Act 2012*, which referred to the proceedings as *DPP v Tyson Jason*  **Leys** , had already been enacted.

[226] Ground 1 was that the sentences fixed in respect of each respondent were unlawful as 44 of the Act did not permit the combination of sentences that were imposed.

[227] (1995) 81 A Crim R 70.

[228] Ibid 72.

[229] Ibid 72.

[230] Ibid 72.

[231] Ibid 83.

[232] See Endnote 2 to the Act.

[233] Emphasis added tracking the amendments.

[234] Victoria, *Parliamentary Debates*, Legislative Assembly, 24 April 1997, 874–7 (Attorney-General).

[235] Explanatory Memorandum, *Sentencing and Other Acts (Amendment) Bill 1997*, 11.

[236] (1995) 81 A Crim R 70.

[237] This is in accordance with the presumption that whenever any legislation is re-enacted after being judicially interpreted, the legislature is to be assumed to have approved that interpretation: see *Wilson v McDonald* [2009] WASCA 39; (2009) 253 ALR 560, 566; Pearce and Geddes [3.43].

[238] *Expressio unius est exclusion alterius*: an express reference to one matter indicates that other matters are excluded. See Pearce and Geddes [4.31].

[239] *Expressum facit cessare tacitum*. This maxim is in effect a re-statement of the *expressio unius* maxim. See Pearce and Geddes [4.34].

[240] *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* [1982] HCA 2; (1982) 148 CLR 88, 94; *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564, 575.

[241] *Commonwealth v Baume* [1905] HCA 11; (1905) 2 CLR 405, 414; Pearce and Geddes [2.26].

[242] *C & J Clark Ltd v Inland Revenue Commissioners* [1973] 1 WLR 905, 911 (Megarry J).

[243] [1920] VicLawRp 95; [1920] VLR 522.

[244] Ibid 533 (Schutt and Mann JJ dissenting).

[245] Section 38(2) of the Act provided: 'The court must – (a) fix the date on which a community correction order commences, which must not be more than 3 months after the order is made; or (b) direct that the community correction order commences on the date that the offender is released from imprisonment in accordance with section 44'.

[246] Section 44(3) provided: 'If a court makes a community correction order in respect of an offender in addition to a term of imprisonment, the community correction order commences on the release of the offender from imprisonment'.

[247] That is, there must be immediate incarceration.

[248] Emphasis added.

[249] That is, if it so happens that the term of imprisonment imposed is not suspended.

[250] See also s 15 of the Act which provides: '(1) If an offender has been sentenced to several terms of imprisonment in respect of any of which a non-parole period was fixed, the offender must serve – (a) firstly, any term or terms in respect of which a non-parole period was not fixed; (b) secondly, the non-parole period; (c) thirdly, unless and until released on parole, the balance of the term or terms after the end of the non-parole period. (2) If during the service of a sentence a further sentence is imposed, service of the first-mentioned sentence must, if necessary, be suspended in order that the sentences may be served in the order referred to in subsection (1)'.

[251] Revised Written Case on behalf of the Respondent (Dillon  **Leys** ) , [33].

[252] Section 17 relevantly provides: '(2) If an offender sentenced to a term of imprisonment is allowed to be or to go at large for any reason, the period between then and the day on which he or she is taken into custody to undergo the sentence does not count in calculating the term to be served and service of the sentence is suspended during that period. (3) If an offender lawfully imprisoned under a sentence escapes or fails to return after an authorised absence, the period between then and the day on which he or she surrenders or is apprehended does not count in calculating the term to be served and service of the sentence is suspended during that period. (4) Despite anything to the contrary in this or any other Act or in any rule of law or practice, a sentence of imprisonment must be calculated exclusive of any time during which service of it is suspended under subsection (2) or (3)'.

[253] Emphasis added.

[254] *Interpretation of Legislation Act*, s 37(c); Pearce and Geddes [6.40]–[6.42].

[255] Section 1(a) and (b) of the Amending Act; Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011, 3292 (Robert Clark, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Council, 27 October 2011, 4037 (Richard Dalla-Riva); Victoria, *Parliamentary Debates*, Legislative Council, 8 November 2011 (Legislative Council) 4330 (Martin Pakula) and 4337 (David O'Brien).

[256] Section 36 of Act; Victoria, *Parliamentary Debates*, Legislative Council, 27 October 2011, 4037 (Richard Dalla-Riva).

[257] Victoria, *Parliamentary Debates*, Legislative Assembly, 15 September 2011, 3292 (Robert Clark, Attorney-General).

[258] Explanatory Memorandum, *Sentencing Amendment (Community Correction Reform) Bill 2011*, 7.

[259] This would not involve the imposition of two or more sentences of imprisonment and so would not fall under the prohibition in s 44(2).

[260] Intentionally causing injury.

[261] Recklessly causing serious injury.

[262] As explained above in relation to the opening words of s 44(1): 'Subject to subsection (2)'.

[263] Victoria, *Parliamentary Debates*, Legislative Assembly, 14 August 2012, 3004-5 (Robert Clark, Attorney-General).

[264] *DPP v Karazisis* [2010] VSCA 350; (2010) 206 A Crim R 14; s 289(2) *Criminal Procedure Act 2009*.

[265] [2010] VSCA 350; (2010) 206 A Crim R 14.

[266] *Ibid* 39 [99] ff.

[267] Indeed, under s 27(2B) of the Act suspended sentences are no longer available for offenders who are guilty of a significant offence. Recklessly causing serious injury is defined as such an offence. However, because this offending occurred before the commencement of s 12 of the Amending Act, and because a finding of guilt has been made in relation to that offence, any term of imprisonment imposed on the respondents may be wholly or partly suspended: s 143(9) of the Act.